No. 93-5418-CFH
Status: GRANTED

Title: Orrin S. Reed, Petitioner
v.
Robert Farley, Superintendent, Indiana State Prison, et al.

Docketed:
July 26, 1993

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Solovy,Jerold S.

Counsel for respondent: Pearson,Linley E., Uhl,Wayne E.

Entry	Date	Note	Proceedings and Orders
1	Jul 26 1993	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Aug 26 1993		DISTRIBUTED. September 27, 1993
4	Sep 1 1993	P	Response requested -- JPS. (Due October 1, 1993)
5	Sep 30 1993		Brief of respondents Robert Farley, Superintendent, Indiana State Prison, et al. in opposition filed.
6	Oct 7 1993		REDISTRIBUTED. October 29, 1993 (Page 5)
7	Oct 21 1993	X	Reply brief of petitioner filed.
9	Nov 1 1993		REDISTRIBUTED. November 5, 1993 (Page 15)
11	Nov 8 1993		Petition GRANTED.
			**********
12	Dec 20 1993		Joint appendix filed.
13	Dec 23 1993		Brief of petitioner Orrin S. Reed filed.
15	Jan 18 1994		Order extending time to file brief of respondent on the merits until February 4, 1994.
16	Feb 2 1994		SET FOR ARGUMENT MONDAY, MARCH 28, 1994. (1ST CASE).
17	Feb 4 1994		Brief amicus curiae of United States filed.
18	Feb 4 1994		Brief of respondents Dick Clark, et al. filed.
19	Feb 7 1994		CIRCULATED.
20	Feb 14 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Seventh Circuit.
21	Feb 22 1994		Record filed.
		*	Original proceedings United States District Court for the Northern District of Indiana.
22	Mar 9 1994	X	Reply brief of petitioner filed.
23	Mar 16 1994		Record filed.
		*	Original proceedings Court of Appeals of Indiana (State court records) (BOX)

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93-5418

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ORRIN S. REED,

Petitioner-Appellant,

v.

DICK CLARK and INDIANA ATTORNEY GENERAL,

Respondents-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

The Interstate Agreement on Detainers ("the IAD"), 18 U.S.C. App., is a federal law and compact signed by 48 states and the federal government which sets out the rights of individuals who are subject to trial in one jurisdiction while in the custody of another jurisdiction's correctional facilities.

The question presented is:

Did the court of appeals err by extending the reasoning of Stone v. Powell to bar federal habeas review of a state prisoner's claim that he was being held in custody in violation of the IAD, a "law[] . . . of the United States," particularly in light of the fact that the decision below: (a) is the fourth conflicting approach taken by the circuits to habeas claims based on IAD violations and thus thwarts Congress's intention to provide uniformity on detainers; and (b) conflicts with the language of the IAD and the holdings or rationale of several decisions of this Court, including Stone v. Powell, the decision upon which it purports to rely?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Orrin Scott Reed, respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit denying petitioner a writ of habeas corpus and declining to overturn his theft conviction.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit affirming the District Court's denial of a writ of habeas corpus and denying rehearing and rehearing in banc, with the dissent from the denial of rehearing in banc, is reported as Reed v. Clark, 984 F.2d 209

(7th Cir. 1993) (Pet. App. 1-6). The decision of the United States District Court for the Northern District of Indiana denying petitioner's writ of habeas corpus is unreported. Reed v. Clark, Civ. No. S 90-226 (Sept. 21, 1990) (Pet. App. 7-18).

The decision of the Indiana Supreme Court affirming petitioner's theft conviction is reported as Reed v. State, 491 N.E.2d 182 (Ind. 1986) (Pet. App. 19-26). The decision of the Indiana Supreme Court denying post-conviction relief is unreported. Reed v. State, No. 25A04-8903-PC-00095 (Ind. April 30, 1990) (Pet. App. 27).

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) (1988) to review the judgment of the Seventh Circuit denying his petition for a writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254 (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provision:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Constitution, Art. 1, § 10, cl. 3.

This case involves the Interstate Agreement on Detainers, 18 U.S.C. App. at 702-05 (1988), which is set out in full in the Appendix. (Pet. App. 28-31).

This case also involves the following provisions of the United States Code:

28 U.S.C. § 2241(c)(3) (1988):

> (c) The writ of habeas corpus shall not extend to a prisoner unless --
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States;

28 U.S.C. § 2254(a) (1988):

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2255 (1988):

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

The IAD is a federal law and an interstate compact, designed to create a uniform system of interjurisdictional transfers while alleviating the disabilities imposed upon prisoners subject to such transfers. See 18 U.S.C. App. at

702-05 (Pet. App. 28-31). The IAD, which is signed by the federal government, 48 states including Indiana,[1] and several United States territories, is sanctioned by Congress under the Compact Clause of the Constitution, and is a law of the United States within the meaning of section 2254. Carchman v. Nash, 473 U.S. 716, 719 (1985); Cuyler v. Adams, 449 U.S. 433, 438 (1981).

The IAD provides specific rights to transferred prisoners. One of these rights is speedy trial within 120 days of a transfer absent good cause shown in open court. Article IV(c), 18 U.S.C. App. § 2, at 703 (Pet. App. at 29). The IAD mandates dismissal with prejudice of the receiving state's criminal charges if the transferred prisoner is not tried within that time. Art. V(c), 18 U.S.C. App. § 2, at 703-04 (Pet. App. at 29-30). To ensure that the rights and remedies contained in the IAD are followed, Congress specifically directed the federal courts to "enforce the agreement on detainers." 18 U.S.C. App. § 5, at 705 (Pet. App. at 31).

Through the IAD, the State of Indiana obtained custody of petitioner from the federal government to try him on a charge of theft of $4666. Petitioner filed a motion alerting the court and prosecutor of his rights under the

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[1] Only Louisiana and Mississippi have chosen not to join the IAD.

IAD.[2] Moreover, the trial judge and prosecutor had signed an acknowledgement of their IAD obligations before petitioner was transferred. (R. 10.) Nevertheless, Indiana failed to adhere to the IAD's 120 day speedy trial requirement.

After the 120 day period ran without a trial, petitioner moved the state court to dismiss the criminal charge, as the IAD requires for violation of this provision. (R. 127-28.) The state court denied this motion.[3] Petitioner was then tried and convicted of the theft charge. Petitioner, who was 51 at the time, was sentenced as an habitual offender under Indiana law to a term of 34 years in prison.[4]

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[2] Indeed, petitioner raised IAD claims on more than one occasion. Petitioner first filed a pro se motion raising general IAD issues. (R. 45.) After an untimely trial date was nevertheless set, petitioner filed pro se motions specifically warning the Indiana court of the running of the IAD's speedy trial provision and noting the number of days that he had been in Indiana's custody. (R. 77-78; 90; 103.)

[3] It cannot be disputed that petitioner was prejudiced by the detainer. In response to petitioner's first pro se motion regarding the IAD, the Indiana trial court itself acknowledged that petitioner was incapable of preparing or presenting his defense from his prison cell:

> It has become apparent to the Court through pretrial proceedings this far held, that the defendant will be incapable of presenting the kind of defense which he has contemplated to date because of his incarceration.

(R. 83.) Absent the detainer, petitioner could have prepared for trial while living in a federal community center. (R. 53.)

[4] The court based its habitual offender sentence on 32 and 24 year old convictions for "setting fire to a car" and larceny. (Pet. App. 25.)

Petitioner appealed the denial of his IAD dismissal motion to the Indiana Supreme Court, which affirmed without reaching the merits of the IAD claim. (Pet. App. 19-26.) The Court acknowledged that petitioner "had made a general demand that trial be held within the time limits of the IAD," but held that petitioner, who was proceeding pro se, had failed to object orally to the setting of untimely trial dates. (Pet. App. at 22.) The Indiana Supreme Court did not cite to any rule requiring an oral motion as well as a written motion, so there was no actual procedural default by petitioner.

After fully exhausting his state court remedies, petitioner raised his IAD claim in a pro se federal habeas petition. The federal district court rejected petitioner's IAD claim after considering the claim on the merits. (Pet. App. 7-18.) According to the district court, the IAD's 120 day period should be tolled during the pendency of motions filed by the petitioner. (Pet. App. at 15-16.)

On appeal, the court of appeals affirmed the district court's decision without considering the merits of petitioner's properly preserved IAD claim. (Pet. App. 1-6.) The court of appeals began by expressly recognizing that it was ignoring the approaches taken by other circuits for reviewing state court decisions on IAD violations. (Pet. App. at 3.) Rather than consider IAD violations as it would constitutional violations, as some circuits do, or subject IAD violations to the higher test of whether the violation

resulted in a "miscarriage of justice," as others do, the court of appeals elected to extend the analysis of Stone v. Powell, 428 U.S. 465 (1976), to IAD violations. (Pet. App. at 3-5.) Concluding that "one complete round of litigation" was enough, the court of appeals held that collateral review of claims under the IAD was unavailable unless the state court had declined to consider the defendant's arguments. (Pet. App. at 4.)

Because the court's decision further splintered the existing circuit split on the cognizability of IAD violations, Mr. Reed filed a petition for rehearing with a suggestion of rehearing in banc. Petitioner also identified inconsistencies between the decision below and this Court's decisions which warranted rehearing.

The petition for rehearing was denied by the Seventh Circuit, with two judges voting for rehearing in banc. One judge filed an opinion dissenting from the denial of rehearing in banc, noting that the case dealt "with a difficult problem upon which the circuits are in disarray and upon which the Supreme Court has given little firm guidance." (Pet. App. at 5-6.) The dissent also noted that the disarray among the circuits defeated the IAD's purpose of having a national uniform method of transferring federal prisoners to state courts. (Pet. App. at 6.)

As a consequence of the decision below, petitioner, who is now 62 years old, is serving the functional equivalent of a life sentence for a state theft charge even though in

some circuits he would have obtained dismissal of the theft charge in habeas corpus proceedings. This disparity is unacceptable under a federal law designed to institute a uniform system for transferred prisoners.

REASONS FOR GRANTING THE WRIT

I.

This Court should review the decision below to resolve a persistent circuit split on the scope of habeas review of a supposedly uniform federal law and interstate compact. The circuits have splintered when applying the habeas statute to IAD violations, as three Justices of this Court had noted even before the decision below, which added a fourth approach to the disarray. See Fex v. Michigan, 113 S. Ct. 1085, 1092 n.1 (1993) (Blackmun and Stevens, JJ., dissenting); Metheny v. Hamby, 488 U.S. 913, 913 & n.2 (1988) (White, J., dissenting from denial of certiorari). Nine of the 13 circuits have now spoken on the issue, many more than once. The existence of multiple interpretations of available collateral relief defeats the IAD's purpose of ensuring uniform treatment of transferred prisoners.

II.

The court of appeals' extension of Stone v. Powell to federal statutes in general, and to the IAD in particular, cannot be reconciled with three of this Court's decisions. First, the decision below conflicts with Brown v. Allen, which established the parameters of federal review of certain

state court rulings concerning federal law. Second, the court of appeals distinguishes between the review of constitutional and federal statutory claims, directly contradicting the holding of Davis v. United States. Finally, the decision below incorrectly extends Stone v. Powell to the review of violations of federal laws, even though this Court expressly limited Stone to violations of judicially created rules.

I.

THIS COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW COMPOUNDS AN ALREADY-FRACTURED SPLIT AMONG THE CIRCUITS CONCERNING A FEDERAL LAW SPECIFICALLY DESIGNED TO ACHIEVE UNIFORMITY.

A. Before Congress passed the IAD in 1970, persons incarcerated in one jurisdiction having a detainer lodged against them often had to endure serious disabilities. Some served a complete sentence in one jurisdiction without knowing whether they would face trial in the other jurisdiction. Often, they could not obtain a speedy trial in the second jurisdiction and could not assist in their own defense in a timely fashion. Those trials, delayed by the incarceration, might be less reliable as witnesses' memories dimmed and evidence aged. Detainers often made conditions of incarceration harsher, too. These inmates were kept in close custody because of the pending detainer and thus were ineligible for desirable work assignments. Others were shuttled between jurisdictions and thus lost valuable

rehabilitation opportunities. Carchman v. Nash, 473 U.S. 716, 719-21 (1985).

This Court recognized that some of these conditions were unconstitutional. In Smith v. Hooey, 393 U.S. 374 (1969) and in Dickey v. Florida, 398 U.S. 30 (1970), the Court held that state prisoners retained their right to speedy trials even if the states were unable to try the defendants because they were in federal custody. Congress enacted the IAD shortly afterward to vindicate prisoners' constitutional right to speedy trials and to prevent the need to reverse convictions. Carchman v. Nash, 473 U.S. at 731 n.9; S. Rep. No. 1356, 91st Cong. 2d Sess. 3 (1970), reprinted in 1970 U.S.C.C.A.N. 4864, 4866 (noting that IAD would "diminish possibility of convictions being vacated or reversed because of denial of speedy trial right"); see also United States ex rel. Escola v. Groomes, 520 F.2d 830, 834 n.11 (3d Cir. 1975).

In particular, Article IV(c) of the IAD dictates that, following transfer pursuant to the IAD, "trial shall be commenced within one hundred twenty [120] days of the arrival of the prisoner in the receiving State, but for good cause shown in open court." Art. IV(c), 18 U.S.C. App. § 2, at 703 (Pet. App. at 29). Article V(c) sets forth the remedy if the trial is not commenced within the 120-day period: the detainer "shall cease to be of any further force or effect," and the court "shall enter an order dismissing the [indictment, information, or complaint] with prejudice."

Art. V(c), 18 U.S.C. App. § 2, at 704 (Pet. App. at 30). Finally, Congress directed "[a]ll courts . . . of the United States . . . to enforce the agreement on detainers . . . ." 18 U.S.C. App. § 5, at 705 (Pet. App. at 31); see also Texas v. New Mexico, 462 U.S. 554, 564 (1982) (noting that interstate compacts' unique nature prohibits courts from "order[ing] relief inconsistent with [their] express terms").

Despite the plain language with which the IAD sets forth the speedy trial right, remedy, and federal court enforcement, the circuits have splintered on how to conduct collateral review of federal statutes in general, and the IAD in particular.[5/] Panels in the Third, Fifth, and Ninth Circuits have granted relief under section 2254 on IAD claims by treating claims based on violations of federal statutes in the same manner as claims based on violations of the Constitution. See Birdwell v. Skeen, 983 F.2d 1332, 1341 (5th Cir. 1993); Cody v. Morris, 623 F.2d 101, 103 (9th Cir. 1980); United States ex rel. Escola v. Groomes, 520 F.2d 830, 839 (3d Cir. 1975); see also Mars v. United States, 615 F.2d 704, 710 (6th Cir.) (Edwards, C.J., dissenting) (urging that no higher standard should apply to non-constitutional claims

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[5/] In five cases in the past eight years, Justice White has urged this Court to resolve the question of under what circumstances an IAD violation is cognizable on habeas. Seymore v. Alabama, 488 U.S. 1018 (1989) (White, J. dissenting from denial of certiorari); Metheny v. Hamby, 488 U.S. 913 (1988) (White, J., dissenting from denial of certiorari); Bryant v. United States, 488 U.S. 916 (1988) (White, J. dissenting from denial of certiorari); Haskins v. Virginia, 484 U.S. 1037 (1988) (White, J., dissenting from denial of certiorari); Kerr v. Finkbeiner, 474 U.S. 929 (1985) (White, J., dissenting from denial of certiorari).

as suggested by Strobel v. Anderson, 587 F.2d 830 (6th Cir. 1978)), cert. denied, 449 U.S. 849 (1980); United States v. Williams, 615 F.2d 585, 589-90 (3d Cir. 1980) (granting relief under § 2255 for IAD violation).

Panels in eight circuits have required that statutory claims demonstrate "a miscarriage of justice" or "exceptional circumstances" before granting habeas relief, but split among themselves when determining whether IAD violations meet that standard. Panels in the Seventh and Ninth Circuits have concluded that IAD violations meet the "miscarriage of justice" standard because Congress made an IAD violation an absolute defense to prosecution. Webb v. Keohane, 804 F.2d 413, 414 (7th Cir. 1986); Tinghitella v. California, 718 F.2d 308, 311 (9th Cir. 1983) (reading an "exceptional circumstances" requirement into Cody). In contrast, panels in the First, Second, Third, Fourth, Sixth, and Eleventh Circuits have concluded that IAD violations do not meet the miscarriage of justice standard or that the petitioner must show serious prejudice (in addition to the failure to be released) caused by the violation. Reilly v. Warden, FCI Petersburg, 947 F.2d 43, 44-45 (2d Cir. 1991), cert. denied, 112 S. Ct. 1227 (1992); Seymore v. Alabama, 846 F.2d 1355, 1359 (11th Cir. 1988), cert. denied, 488 U.S. 1018 (1989); Metheny v. Hamby, 835 F.2d 672, 675 (6th Cir. 1987), cert. denied, 488 U.S. 913 (1988); Casper v. Ryan, 822 F.2d 1283, 1290 (3d Cir. 1987) (distinguishing Escola and suggesting that "mandatory sanction of dismissal was just one

of the factors" that led the Court in United States v. Williams, 615 F.2d 585 (3d Cir. 1980), to grant habeas relief), cert. denied, 484 U.S. 1012 (1988); Kerr v. Finkbeiner, 757 F.2d 604, 607 (4th Cir.) (no claim in absence of prejudice), cert. denied, 474 U.S. 929 (1985); Fasano v. Hall, 615 F.2d 555, 558-59 (1st Cir.), cert. denied, 449 U.S. 867 (1980).[6/]

The court of appeals below summarily rejected these three approaches to section 2254 claims based upon violations of federal law as "unlikely to get [the court] anywhere." (Pet. App. at 3.) Instead, the court held that the rationale of Stone v. Powell, 428 U.S. 465 (1976), governed whether IAD violations asserted by state prisoners were cognizable under section 2254. According to this fourth approach, an IAD violation is not cognizable in habeas corpus proceedings unless the state courts have failed to entertain and resolve the claim. (Pet. App. at 5.) This approach effectively abdicates federal habeas corpus review of state court resolutions of claimed IAD violations, thus frustrating the directive of Congress that the federal courts enforce the IAD. 18 U.S.C. App. § 5, at 705 (Pet. App. at 31).

[6/] Even under this approach, in which petitioner must demonstrate prejudice, Mr. Reed was clearly prejudiced by the State's IAD violation. Once his federal sentence ended, Mr. Reed remained in a county jail until his trial solely because of the detainer. The Indiana trial court recognized that this interfered with his ability to defend himself on the theft charges. See supra note 3.

B. The need to resolve this compound fracture among the circuits is especially great here because the disarray among the circuits interferes with the IAD's purpose of providing a uniform method for the interjurisdictional transfer of prisoners. At the present time, two inmates transferred from the same federal correctional facility to states in different circuits whose trials are not conducted within 120 days may have diametrically opposite results in their habeas actions: the inmate whose trial is delayed in Texas will have the state criminal charges dismissed upon habeas review; the inmate whose trial is delayed in Indiana, however, will have only the habeas corpus petition dismissed. Uniformity -- an important goal of the IAD -- is thereby defeated.

Because the IAD is a federal law, this Court is the ultimate tribunal for resolving disputes over the meaning of its provisions. See Cuyler, 449 U.S. at 442 (holding that the IAD is an interstate compact the interpretation of which presents a question of federal law); West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951) ("Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts."); Bush v. Muncy, 659 F.2d 402, 413 (4th Cir. 1981) ("the IAD will over time be subjected to the uniform interpretation which, as federal law, it must be given"). Over the years, the Supreme Court has exercised this authority on a number of occasions, most recently this

term. Fex v. Michigan, 113 S. Ct. 1085 (1993); see also Carchman v. Nash, 473 U.S. 716 (1985); Cuyler v. Adams, 449 U.S. 433 (1981); United States v. Mauro, 436 U.S. 340 (1978) (noting certiorari granted because of circuit conflict). Significantly, this review has occurred on both direct and collateral review. Compare Fex, 113 S. Ct. at 1088 (direct review of Michigan Supreme Court decision) with Carchman, 473 U.S. at 722 (habeas review under § 2254). See also Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 485 (1973) (holding that district court erred in dismissing § 2254 detainer claim for lack of jurisdiction).

Review by this Court is especially necessary and appropriate here. Unlike circuit conflicts over differing interpretations of most federal statutes, which Congress can resolve by legislative action, the IAD is an interstate compact which cannot be clarified or revised by Congress alone. See Carchman, 473 U.S. at 749 n.18 (Brennan, J. dissenting). Consequently, the only means to attain uniformity is this Court's review. Recognizing this, Congress directed the federal courts to enforce the provisions of the IAD and gave federal courts the power to ensure that the IAD's purposes, which include uniformity, are fulfilled. See 18 U.S.C. App. § 5, at 705 (Pet. App. at 31). The approach of the court of appeals below -- the fourth adopted by the circuits -- simply ignores this congressional directive.

Nor does federal review of the IAD impinge on state comity interests. By voluntarily signing a compact that is a federal law, the 48 state signatories explicitly acquiesced to federal court review. See Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 281-82 (1959) (by accepting and acting under compact, parties assume whatever conditions Congress imposed when it consented to compact). The majority of the states -- including Indiana -- signed the IAD after the federal government became a signatory. None of the prior members exercised the right to withdraw, provided by Article IX, after the federal government became a party to the IAD. See S. Rep. No. 1356, 91st Cong. 2d Sess. 2-3, reprinted in 1970 U.S.C.C.A.N. 4864, 4866-67. Thus, all 48 of the signatory states were aware that federal courts would be reviewing their state courts' decisions on the IAD and nevertheless chose to participate. For these reasons, federal review of state court IAD violations is entirely appropriate.

II.

THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S DECISIONS IN BROWN, DAVIS, AND STONE.

The decision below, barring collateral review of federal statutes unless the state court declined to consider the defendant's argument, is inconsistent with this Court's decision in Brown v. Allen, 344 U.S. 443 (1953), Davis v. United States, 417 U.S. 333 (1974), and Stone v. Powell,

428 U.S. 465 (1976). Review by this Court is necessary to correct the serious error made by the court below.[7]

In Brown v. Allen, 344 U.S. 443 (1953), this Court authorized federal courts to re-examine, under 28 U.S.C. § 2254, subjects that had been addressed by state courts. Although Brown dealt with constitutional violations, it made no distinction between constitutional and statutory claims when establishing broad review powers over the state courts. Contrary to Brown, the court of appeals below narrowed the review given to claims based upon violations of federal statutes. (Pet. App. at 2-3.) That conclusion is contrary to the plain language of 28 U.S.C. § 2254, which provides relief if a person is "in custody in violation of the Constitution or laws or treaties of the United States." Because the habeas statute does not distinguish among the Constitution, laws and treaties, neither should the federal courts. See, e.g., United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) ("plain language of legislation should be conclusive"). Indeed, as Justice Frankfurter observed in Brown v. Allen, "the wisdom of . . . a modification in the [habeas] law is for Congress to

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[7] In addition to the IAD, the ruling below would affect claims brought under the federal wiretap statute, 18 U.S.C. § 2515 et seq. See, e.g., Hussong v. Warden, Wisc. State Reformatory, 623 F.2d 1185, 1190 (7th Cir. 1980) (applying "miscarriage of justice" standard to state court violation of wiretap statute); Adams v. Lankford, 788 F.2d 1493, 1500 (11th Cir. 1986) (same); Llamas-Almaguer v. Wainwright, 666 F.2d 191, 193-94 (5th Cir. 1982) (same); Vitello v. Gaughan, 544 F.2d 17, 18-19 (1st Cir. 1976) (same), cert. denied, 431 U.S. 904 (1977).

consider . . . . It is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress." 344 U.S. at 500.

The decision below also conflicts with Davis v. United States, 417 U.S. 333 (1974), in which this Court refused to treat statutory and constitutional claims differently. Davis presented this Court with a habeas corpus challenge to a federal conviction under 28 U.S.C. § 2255. The claim, which challenged federal custody as violating a federal law, had not been presented to the federal courts on direct appeal. 417 U.S. at 342. The government argued that statutory claims were less important and urged this Court to eliminate habeas review for statutory claims. 417 U.S. at 342. This Court rejected that argument, holding instead that the standard for collateral review under section 2255 is the same "whether the claim had its source in the Constitution or in the 'laws of the United States.'" 417 U.S. at 346. The decision below is inconsistent with that holding.

Decisions by the circuits that apply a "miscarriage of justice" standard to section 2254 claims of IAD violations (or to other section 2254 claims that state custody is in violation of federal law) also are inconsistent with Davis. That inconsistency results from a misreading of Davis. Rather than distinguish between constitutional and statutory claims, the Court in Davis imposed a higher standard before relief would be granted as to all claims for which prior

federal court review of the alleged error of federal law had occurred:

> whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t ... present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.

417 U.S. at 346 (quoting another § 2255 case, Hill v. United States, 368 U.S. 424, 428 (1972)).

As would be expected, the Davis "miscarriage of justice" standard has since been applied when habeas petitioners have failed to preserve properly their claims or have brought their claim in an unusual way. For example, the standard has been applied when section 2255 petitioners failed to raise constitutional claims in their direct federal appeal and have first asserted them on collateral review. See, e.g., United States v. Johnson, 615 F.2d 1125, 1127 (5th Cir. 1980). In addition, a "miscarriage of justice" standard has been applied when section 2254 petitions are subject to defenses of successive claims, abuse of the writ, or procedural default. See, e.g., Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992). But this court has never applied this standard to properly preserved and presented section 2254 claims.

Finally, the decision below conflicts with the very decision upon which it purports to rely. In Stone v. Powell, 428 U.S. 465 (1976), this Court held that federal habeas review of a purported Fourth Amendment violation is available only when the state court has failed to address that claim.

Stone's reach is very short. As this Court explained, Stone is "not concerned with the scope of the habeas corpus statute" but rather with the scope of the exclusionary rule, "a judicially created remedy." Id. at 495 n.37 (1976) (Court's emphasis). Since 1976, this Court repeatedly has declined to extend the reasoning of Stone v. Powell beyond its original bounds: the collateral review of Fourth Amendment exclusionary rule violations. See Withrow v. Williams, 113 S. Ct. 1745 (1993) (declining to extend Stone to Miranda claims); Kimmelman v. Morrison, 477 U.S. 365 (1986) (declining to extend Stone to Sixth Amendment ineffective assistance of counsel claims); Rose v. Mitchell, 443 U.S. 545 (1979) (declining to extend Stone to equal protection claims); Jackson v. Virginia, 443 U.S. 307 (1979) (declining to extend Stone to due process claims under Fourteenth Amendment).

These cases demonstrate, as Justice O'Connor recently explained, that:

> decisions concerning the availability of habeas relief warrant restraint. Nowhere is the Court's restraint more evident than when it is asked to exclude a substantive category of issues from relitigation on habeas.

Withrow, 113 S. Ct. at 1758 (O'Connor, J.) (concurring in part, dissenting in part). Indeed, no circuit has applied the rationale of Stone to violations of federal statutes since it was decided seventeen years ago. Cf. Hussong, 623 F.2d at 1187-90 (applying Stone v. Powell test to Fourth Amendment exclusionary rule claim but applying "miscarriage

of justice" to statutory federal wiretap claim); Fasano, 615 F.2d at 558-59 & n.* (comparing IAD violations to Fourth Amendment claims contained in Stone, but applying Davis test to IAD violations).

More importantly, the rationale of Stone is inapplicable to habeas claims raising a violation of the IAD. The Court was influenced in Stone by the "prophylactic" nature of the judicially created exclusionary rule, which had broader reach than was required by the Fourth Amendment upon which it was based. The rule itself was not mandated by federal law or the Constitution. Thus, this Court concluded that the exclusionary rule's scope and application was entirely within the Court's control.

Here, however, the Court addresses a federal law and interstate compact, not a judicially created rule. Rather than leave it to the courts to fashion a prophylactic test, Congress required the state courts to try federal prisoners transferred to them within 120 days or dismiss the charges with prejudice. And Congress has mandated that the federal courts "enforce the agreement on detainers." 18 U.S.C. App. § 5, at 705 (Pet. App. at 31). Thus, this Court's cost-benefit analysis in Stone, which was formulated to define the scope of a remedy that it alone created, does not apply to the task of interpreting rights and remedies created and sanctioned by Congress. See Hussong, 623 F.2d at 1190 (refusing to extend Stone to federal wiretapping act

because the "exclusionary rule in the wiretap statute was created by the legislature, not the courts").

Moreover, Stone stressed the need to balance habeas review's value in preventing future violations (the rationale for the exclusionary rule) against state comity interests. 428 U.S. at 493. This balancing test is easily administered here because enforcing IAD violations does not interfere with state comity. The parties to the IAD, including 48 states, agreed to create and enforce a speedy trial right for prisoners transferred pursuant to the IAD. The remedy they agreed upon for violations of the speedy trial right was mandatory dismissal of the charges with prejudice. Collateral review here does not involve forcing the states to abide by a rule created by the federal courts; rather it involves uniform enforcement of the plain language of a compact to which the signatory states agreed. This does not intrude upon state comity.

Finally, this Court's decision in Withrow eliminates any remaining support for the rationale of the decision below.[8/] The court of appeals below supported its ruling that state court review of federal statutory claims

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[8/] Less than a week before rehearing was denied, this Court decided Withrow v. Williams, 113 S. Ct. 1745 (1993), which holds that the restriction on the exercise of federal habeas jurisdiction in Stone v. Powell does not extend to a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards mandated by Miranda v. Arizona, 384 U.S. 436 (1966). Petitioner provided the Withrow opinion to the court of appeals pursuant to Federal Rule of Appellate Procedure 28(j) and Circuit Rule 28(j), but the court below did not acknowledge that decision in any way.

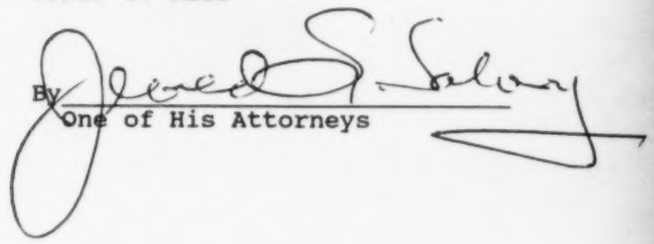
precluded collateral review by citing: (1) Stone v. Powell; (2) Justice O'Connor's concurrence in Duckworth v. Eagan, 492 U.S. 195, 205-14 (1989); and (3) this Court's grant of certiorari in Withrow. (Pet. App. at 4.) But in Withrow, this Court once again declined to extend the reasoning of Stone v. Powell to other claims, rejecting the Duckworth concurrence, and affirming the court of appeals' decision in Withrow. Thus, the decision below lacks any support for extending Stone v. Powell to state prisoners' habeas claims of federal statutory violations.

CONCLUSION

For the foregoing reasons, petitioner Orrin Scott Reed respectfully requests that this Court grant the Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ORRIN S. REED

By: 
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Dated: July 26, 1993

APPENDIX
OF
PETITIONER-APPELLANT

APPENDIX
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Orrin Scott REED, Petitioner-Appellant,

v.

Dick CLARK, Superintendent, and Attorney General of Indiana, Respondents-Appellees.

No. 90-3264.

United States Court of Appeals,

Seventh Circuit.

Argued Dec. 9, 1992.

Decided Jan. 19, 1993.

Rehearing and Rehearing In Banc Denied April 27, 1993.

Petitioner appealed from order of the United States District Court for the Northern District of Indiana, Allen Sharp, Chief Judge, denying his petition for writ of habeas corpus. The Court of Appeals, Easterbrook, Circuit Judge, held that receiving state's alleged failure to try petitioner within 120 days of arrival, in violation of Interstate Agreement on Detainers, was not grounds for federal habeas relief.

Affirmed.

Cudahy, and Ripple, Circuit Judges, voted for rehearing in banc.

Ripple, Circuit Judge, filed an opinion dissenting from denial of rehearing in banc.

1. Habeas Corpus ⇐509(1)

Indiana's alleged violation of its own procedures for establishing petitioner's status as habitual offender was not ground for federal habeas relief. 28 U.S.C.A. § 2254(a).

2. Habeas Corpus ⇐526

Receiving state's alleged failure to try petitioner within 120 days of arrival, in violation of Interstate Agreement on Detainers (IAD), was not grounds for federal habeas relief, where state court resolved defendant's claim under IAD. 28 U.S.C.A. § 2254(a).

3. Habeas Corpus ⇐526

Unless state fails to entertain and resolve claims under the Interstate Agreement on Detainers (IAD), collateral review is unavailable in federal court. 28 U.S.C.A. § 2254(a).

4. Habeas Corpus ⇐526

Whether federal prisoner had right to hearing under Interstate Agreement on Detainers (IAD) before he was transferred to state custody could not be addressed in federal habeas proceeding. 28 U.S.C.A. § 2254(a).

Thomas J. McCarthy (argued), Jerold S. Solovy, Barry Sullivan, Scott I. Hamilton, Sharon L. Beckman, Jenner & Block, Chicago, IL, for petitioner-appellant.

Michael A. Schoening, Wayne E. Uhl (argued), Dist. Attys. Gen., Sharon L. Wright, Federal Litigation, Indianapolis, IN, for respondents-appellees.

Before POSNER and EASTERBROOK, Circuit Judges, and WOOD, Jr., Senior Circuit Judge.

EASTERBROOK, Circuit Judge.

While serving time in federal prison, Orrin Scott Reed was indicted by Indiana on a charge of theft. Indiana asked the United States to deliver Reed for trial under the Interstate Agreement on Detainers. Indiana took custody of Reed on April 27, 1983. Article IV(c) of the IAD provides that "trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court ... may grant any necessary or reasonable continuance." Indiana thus had until August 25, 1983, to put Reed on trial or extend the time for "good cause shown in open court". Article V(c) prescribes dismissal of the charges, with prejudice, as the consequence of excessive delay.

Reed's trial began on October 18, 1983. Reed consented to a postponement from the scheduled date of September 13, but even that date was beyond the 120 days the IAD allows. He was convicted and sentenced to 34 years' imprisonment as an habitual offender. The Supreme Court of Indiana affirmed, concluding that Reed (who was serving as his own counsel) should have alerted the trial judge during hearings on June 27 and August 1 at which the trial date was set and then postponed. *Reed v. State*, 491 N.E.2d 182, 185 (Ind. 1986). Had Reed reminded the judge of the 120-day limit during either of these hearings, instead of burying his demand in a flood of other documents, the court could have complied with the IAD's require-

ments. A collateral attack in state court foundered when the inferior courts treated the Supreme Court's decision as conclusive. Reed then turned to federal court, which did not mention the state court's reason and instead held that Reed's many motions accounted for "a significant amount of the delay" and thus established "good cause" under Article IV(c).

[1] A federal court may grant collateral relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). That principle immediately disposes of Reed's argument that Indiana failed to comply with its own procedures for establishing his status as an habitual offender. The premise is wrong, for the Supreme Court of Indiana, whose word on questions of state law is authoritative, concluded that the state had followed its own rules. 491 N.E.2d at 188–89. But it would not matter if Indiana were out of compliance with state law. "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, — U.S. —, —, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991). See also, e.g., *Jones v. Thieret*, 846 F.2d 457 (7th Cir.1988). Nothing is to be gained by insisting, as Reed does, that Indiana violated the Constitution by misapplying its laws. Metamorphosing state into constitutional law is inconsistent with many decisions. E.g., *Snowden v. Hughes*, 321 U.S. 1, 8–11, 64 S.Ct. 397, 401–02, 88 L.Ed. 497 (1944); *Archie v. Racine*, 847 F.2d 1211, 1216–18 (7th Cir.1988) (in banc).

[2] The Interstate Agreement on Detainers also is a state law—but because it is an interstate compact, it is a law of the United States as well. *Carchman v. Nash*, 473 U.S. 716, 719, 105 S.Ct. 3401, 3403, 87 L.Ed.2d 516 (1985); *Cuyler v. Adams*, 449 U.S. 433, 438–42, 101 S.Ct. 703, 706–09, 66 L.Ed.2d 641 (1981). Recognizing that violations of federal statutes are less likely than violations of the Constitution to lead to collateral relief, see *United States v. Timmreck*, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979); *Davis v. United States*, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974); *Hill v. United States*, 368 U.S. 424, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962); *Sunal v. Large*, 332 U.S. 174, 67 S.Ct. 1588, 91 L.Ed. 1982 (1947), Reed tries to "constitutionalize" the IAD, but this maneuver works no better on the IAD than on Indiana's rules for establishing habitual-offender status. Reed contends: "[T]he IAD's mandatory language establishes a liberty interest protected by the due process clause of the Fifth and Fourteenth Amendments. The State of Indiana therefore violated Mr. Reed's due process guarantees and his IAD right when the State failed to try him within 120 days." Yet all the IAD does is prescribe procedures: hearing before transfer, trial within 120 days of arrival, and so on. Procedures for adjudication are neither "liberty" nor "property" for constitutional purposes. *Olim v. Wakinekona*, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983). Statutes and rules establish liberty or property interests only to the extent they prescribe substantive rules of decision. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460–63, 109 S.Ct. 1904, 1908–10, 104 L.Ed.2d 506 (1989); *Wallace v. Robinson*, 940 F.2d 243 (7th Cir.1991) (in banc); *Doe v. Milwaukee County*, 903 F.2d 499 (7th Cir.1990). When a state does not comply with a procedure specified in a statute or rule, it has violated that statute or rule, nothing more. Reed can succeed on this collateral attack, therefore, only by persuading us to reopen a statutory question decided adversely to him by the Supreme Court of Indiana.

Although § 2254(a) permits a court to issue a writ of habeas corpus to end custody that violates laws of the United States, the Supreme Court has yet to decide when such relief is appropriate. Indeed, the Court has yet to decide whether *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), which authorizes reexamination of subjects addressed by state courts, applies to claims based on federal statutes. Nothing in the text of § 2254 suggests a difference between the treatment of statutory and constitutional arguments, but the Court nonetheless has been chary of equating the two, lest collateral review become a rerun of the direct appeal. *Sunal*, *Hill*, and *Timmreck* say that statutory arguments ordinarily may not be raised collaterally. These cases were decided under 28 U.S.C. § 2255, which applies to federal prisoners, but the language of § 2254 and § 2255 is identical in all material respects, and the Court has concluded that the two are "identical in scope". *Davis*, 417 U.S. at 343, 94 S.Ct. at 2304.

Sunal and its successors hold that there is a difference between "custody in violation of the ... laws ... of the United States" and a violation of those laws by the state. "To show that 'the custody'—and not simply the custodian—violates the law, the prisoner must at a minimum trace the prejudicial effect of the error." *White v. Henman*, 977 F.2d 292, 295 (7th Cir.1992). *Davis* and *Hill* call on us to search for "exceptional circumstances" amounting to "a fundamental defect which inherently results in a complete miscarriage of justice". 417 U.S. at 346, 94 S.Ct. at 2305, quoting from 368 U.S. at 428, 429, 82 S.Ct. at 471, 472. Unfortunately, such formulas rarely settle concrete disputes. What is "exceptional" depends on your point of view. Some courts have concluded that the IAD does not create a "fundamental" right and that violations rarely if ever result in a "miscarriage of justice". E.g. *Fasano v. Hall*, 615 F.2d 555 (1st Cir.1980); *Edwards v. United States*, 564 F.2d 652 (2d Cir. 1977); *Kerr v. Finkbeiner*, 757 F.2d 604 (4th Cir.1985); *Metheny v. Hamby*, 835 F.2d 672 (6th Cir.1987); *Greathouse v. United States*, 655 F.2d 1032 (10th Cir. 1981); *Seymore v. Alabama*, 846 F.2d 1355 (11th Cir.1988). Others have reached a contrary conclusion, pointing to the IAD's remedy: dismissal with prejudice. Surely it is a miscarriage of justice to hold in prison a person who should have been released outright, these courts believe. *United States v. Williams*, 615 F.2d 585, 589–90 (3d Cir.1980); *Gibson v. Klevenhagen*, 777 F.2d 1056 (5th Cir.1985); *Cody v. Morris*, 623 F.2d 101 (9th Cir.1980). Controversy has developed within two of these circuits as judges debate which parts of the IAD are "fundamental" and which are not. E.g., *Cooney v. Fulcomer*, 886 F.2d 41, 44 (3d Cir.1988); *Carlson v. Hong*, 707 F.2d 367, 368 (9th Cir.1983). Our circuit has not taken a position on this subject. We have recognized that the IAD is a law of the United States without delineating the circumstances under which its violation leads to collateral relief. *Webb v. Keohane*, 804 F.2d 413 (7th Cir.1986); *Esposito v. Mintz*, 726 F.2d 371 (7th Cir.1984).

Verbal analysis of "fundamental defect" or "miscarriage of justice" or "exceptional circumstances" is unlikely to get us anywhere. The meaning of "custody in violation of the ... laws ... of the United States" must depend in large measure on why federal courts ever reexamine decisions reached by state courts. State courts may be hostile to federal norms, and as a practical matter the Supreme Court of the United States can review only a tiny fraction of all state decisions. Constitutional rights, insulated from popular control, are most likely to engender hostility; a majority may very much wish to do things otherwise. Statutory rights are more likely to enjoy majority support, with a correspondingly reduced need for multiple layers of judges. Some states may be out of sympathy with some federal laws, but many of these laws command overwhelming contemporary support. Consider the IAD: this is a federal law by virtue of its status as an interstate compact, but it is also a law of Indiana. We have no more reason to suppose that the Supreme Court of Indiana seeks to undermine the IAD than we have to suppose that it seeks to undermine any other law of Indiana.

The high costs of collateral review influence the proper scope of that enterprise. See *Parke v. Raley*, — U.S. —, 113 S.Ct. 517, 118 L.Ed.2d 318 (1992); *Keeney v. Tamayo-Reyes*, — U.S. —, 112 S.Ct. 1715, 121 L.Ed.2d 391 (1992); *Coleman v. Thompson*, — U.S. —, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *McCleskey v. Zant*, — U.S. —, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); *Kuhlmann v. Wilson*, 477 U.S. 436, 444–55, 106 S.Ct. 2616, 2621–28, 91 L.Ed.2d 364 (1986) (plurality opinion); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *Mackey v. United States*, 401 U.S. 667, 682–83, 91 S.Ct. 1160, 1174–75, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring); *Taylor v. Gilmore*, 954 F.2d 441 (7th Cir. 1992), cert. granted, — U.S. —, 113 S.Ct. 52, 121 L.Ed.2d 22 (1992); *Brecht v. Abrahamson*, 944 F.2d 1363 (7th Cir.1991), cert. granted, — U.S. —, 112 S.Ct. 2937, 119 L.Ed.2d 563 (1992). It would be otiose to recapitulate these costs, which underlie the limitations expressed in *Sunal*, *Hill*, *Davis*, and *Timmreck*. High costs may be worth bearing to prevent continuing unconstitutional custody, and in one other circumstance: when the confined person is innocent. *Davis*, the only decision of the Supreme Court ever to hold that a person was in "custody in violation of the ... laws ... of the United States", arose out of such a situation. After Davis had been convicted, the court of appeals held in a different case that the acts of which he had been

accused did not constitute a crime. Imprisoning a person whose acts are not illegal, *Davis* concluded, creates "custody in violation of the ... laws ... of the United States." *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), expresses a similar thought when holding that federal courts will review state convictions to ensure that a reasonable jury could have found the defendant guilty. Although *Jackson* borders on a search for violations of state law, see *Fagan v. Washington*, 942 F.2d 1155 (7th Cir.1991); *Bates v. McCaughtry*, 934 F.2d 99 (7th Cir.1991), it also emphasizes the special value attached to claims of innocence. See also *Kuhlmann* and, e.g., Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142 (1970); Ronald J. Allen, *Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 Tex.L.Rev. 269 (1977).

Stone v. Powell illustrates the limits of collateral review for errors that do not themselves violate the Constitution. Although the fourth amendment forbids unreasonable searches and seizures, it does not prescribe a remedy for violations. The exclusionary rule, devised to influence the police to respect the rights of suspects, is not constitutionally obligatory—and, *Stone* holds, will not be applied on collateral review unless the state court declines to consider the defendant's arguments. One complete round of litigation on remedial contentions is enough, the Court concluded. See also *Duckworth v. Eagan*, 492 U.S. 195, 205–14, 109 S.Ct. 2875, 2881–86, 106 L.Ed.2d 166 (1989) (O'Connor, J., concurring) (concluding that claims based on *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), should be treated in the same way); *Williams v. Withrow*, 944 F.2d 284 (6th Cir.1991), cert. granted, — U.S. —, 112 S.Ct. 1664, 118 L.Ed.2d 386 (1992).

Against this background, consider some possible interpretations of "custody in violation of the ... laws ... of the United States." Imprisonment may be said to violate the law when:

1. Any step in the process leading to conviction violates federal law; or
2. A violation of federal law in the course of prosecution should lead to dismissal with prejudice; or
3. Compliance with the federal law would prevent conviction; or
4. The state has failed to entertain or resolve a properly raised defense based on federal law; or
5. An innocent person has been convicted.

Davis and *Jackson* hold that condition (5), innocence, requires collateral relief. See also *Kuhlmann* and, e.g., *Sawyer v. Whitley*, — U.S. —, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). *Stone* adds that condition (4) also calls for collateral review. Although the Supreme Court has yet to consider condition (3), a federal law that makes it *impossible* for the state to convict a particular defendant also affords a strong foundation for relief. In such cases a state may be tempted to evade its obligations under the Supremacy Clause. Collateral review vindicates the federal interest at little cost to (legitimate) state interests—for by hypothesis the state has no entitlement to imprison the accused. But of course Reed's custody is not illegal in this sense. Compliance with the IAD would not have foreclosed his conviction. Had Indiana put Reed to trial within 120 days of his transfer from federal prison, everything would have proceeded as it did. Reed does not contend that vital evidence fell into the prosecutor's hands (or slipped through his own fingers) between August 26 and September 19, 1983.

Only conditions (1) and (2) hold out hope for Reed. By now it should be clear that condition (1) does not support collateral review. *Sunal*, *Hill*, *Timmreck*, and *Stone* would have come out the other way if an error of federal law during the proceedings leading to conviction automatically yields "custody in violation of the ... laws ... of the United States." But-for causation is not enough. Neither is condition (2). That dismissal with prejudice is the *remedy* for a violation tells us nothing about the question whether the federal court may inquire into the *existence* of a violation. Statutes may call for dismissal the better to induce compliance; beefing up the remedy does not imply the need for extra layers of review. Otherwise strong remedies would get stronger, and weak remedies would stay weak. Dismissal with prejudice is appropriate for both actual innocence and commencing the prosecution one day after the expiration of the statute of limitations, but only the former justifies sequential review in state and federal court. Conditions (2) and (3) examine the same subject at

different times: condition (3) asks whether the federal norm makes conviction impossible *ex ante*, while condition (2) asks whether the federal norm calls for dismissal *ex post* if the state violates a federal rule. Condition (3) looks at the quality of the substantive rule, and condition (2) at the remedy. Collateral review should be used to enforce the important substantive rules, which determine who may and may not be convicted.

[3] All of this leads to the conclusion that *Stone v. Powell* establishes the proper framework for evaluating claims under the IAD. Accord, Note, *Federal Habeas Corpus Review of Nonconstitutional Errors: The Cognizability of Violations of the Interstate Agreement on Detainers*, 83 Colum.L.Rev. 975 (1983). Condition (4), the domain of *Stone*, is the only relevant one. The IAD does not define factual or legal guilt, so condition (5) drops out, and does not put insuperable hurdles in the way of conviction, so condition (3) also falls away. Unless a state fails to entertain and resolve claims under the IAD, collateral review is unavailable in federal court.

Indiana entertained and resolved Reed's contention that the trial began too late. It concluded that Reed had not alerted the trial judge to the potential problem either during the hearing at which the trial date was set or during the hearing at which the date was postponed. During the pretrial conference of August 1, 1983, Reed presented several arguments based on the IAD, including claims that the federal government should have held a hearing before turning him over to the state and that his treatment in Indiana fell short of the state's obligations under Art. V(d) and (h). Reed did not mention the fact that the date set for trial would fall outside the 120 days allowed by Art. IV(c). Courts often require litigants to flag important issues orally rather than bury vital (and easily addressed) problems in reams of paper, as Reed did. E.g., Fed.R.Crim.P. 30 (requiring a distinct objection to jury instructions); cf. Fed.R.Crim.P. 12(b) (a district judge may require motions to be made orally). It would not have been difficult for the judge to advance the date of trial or make a finding on the record of good cause, either of which would have satisfied Art. IV(c). Because the subject never came up, however, the trial judge overlooked the problem. Whether or not the approach of the Supreme Court of Indiana would be an independent and adequate procedural ground in support of the judgment (Respondents have not invoked *Wainwright v. Sykes*, although they cite several state cases dealing with waiver), it shows that Indiana entertained Reed's contentions without hostility to the federal statute.

[4] On one issue, however, the state court was silent. Reed contends that the failure of the federal Bureau of Prisons to give him a hearing before transferring custody to Indiana violates Art. IV(a) of the IAD. Silence may permit review under *Stone*. Reed relies principally on *Cuyler*, 449 U.S. at 443–50, 101 S.Ct. at 709–12, which held that Art. IV requires a hearing before one state may turn a prisoner over to another. The warden of the penitentiary at Terre Haute denied Reed's request, explaining: "It is the Bureau of Prison's [sic] position that inmates in Federal Custody are not entitled to the pre-transfer hearing that is referenced by *Cuyler v. Adams*." Transfer under Art. IV is a substitute for extradition. The opportunity for pre-transfer review permits a prisoner to ask the governor to decline the request for transfer. A prisoner in federal custody has no such avenue of relief. Reed does not point to any language in the IAD or any decision by a federal court requiring the federal government to extend the sort of opportunity that states traditionally have afforded in extradition proceedings. To create a parallel opportunity by implication would be to create a new rule of law, which may not properly be done in collateral proceedings. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Once again, therefore, we do not address the substance of Reed's contentions.

Our opinion has addressed the arguments of Reed's appointed counsel. By a separate brief, Reed personally advances numerous additional contentions. We have considered all of these, none of which requires discussion.

AFFIRMED.

ON PETITION FOR REHEARING

Decided April 27, 1993.

Before POSNER and EASTERBROOK, Circuit Judges, and WOOD, Jr., Senior Circuit Judge.

A petition for rehearing was filed by the petitioner in this case. All of the judges on the panel voted to deny rehearing, and the petition is accordingly denied.

A judge in active service called for a vote on the suggestion of rehearing in banc, which failed to obtain a majority. Judges Cudahy and Ripple voted for rehearing in banc.

RIPPLE, Circuit Judge, dissenting from the denial of rehearing in banc.

The panel opinion in this case is a thoughtful attempt to deal with a difficult problem upon which the circuits are in disarray and upon which the Supreme Court has given little firm guidance. *See Metheny v. Hamby*, 488 U.S. 913, 109 S.Ct. 270, 102 L.Ed.2d 258 (1988) (White, J., dissenting from the denial of certiorari). As the state quite frankly points out in its reply to the petition for rehearing, this opinion sets us on a different course from that adopted by the other circuits. Indeed, the panel gives rather short shrift to the efforts of the other circuits by dismissing their approaches as "unlikely to get us anywhere." *Reed v. Clark*, 984 F.2d 209, 211 (7th Cir. 1993).

Before we add to the disarray among the circuits, the matter ought to be heard in banc. This course is especially advisable in light of the tension between this holding and the court's previous opinion in *Neville v. Cavanagh*, 611 F.2d 673 (7th Cir.1979), *cert. denied*, 446 U.S. 908, 100 S.Ct. 1834, 64 L.Ed.2d 260 (1980). In that case, this court refused, on comity grounds, to grant a habeas petition by a prisoner who unsuccessfully had argued an IAD violation before the Illinois Supreme Court in an attempt to block pending criminal charges. In denying the relief sought, this court stated:

> In light of the fact that Neville does seek to derail a pending state criminal proceeding, and that he may be acquitted at trial, we believe the district court was correct in denying the petition for a writ of habeas corpus at this time. *We note that this decision does not bar federal consideration of Neville's claim. Rather, it merely delays such consideration until "a time when federal jurisdiction will not seriously disrupt state judicial processes."*

Id. at 676 (footnotes omitted) (emphasis added). Under *Reed*, *Neville* cannot stand. Here the panel specifically holds:

> Unless a state fails to entertain and resolve claims under the IAD, collateral review is unavailable in federal court.

Op. at 213. *Neville*, then, clearly was a case in which the state court resolved the IAD claim against the prisoner. The court did not dismiss the habeas petition on jurisdictional grounds but held that, until a trial on the merits of the underlying indictment, the federal court would delay adjudication of the habeas petition. *Neville*, 611 F.2d at 676.

Also of note in *Neville* is the dissenting opinion of Judge Cudahy. He wrote:

> It would be extraordinarily useful in the instant case for a federal court to promptly consider and construe this interstate detainer compact because this compact attempts to provide a *nationally uniform* method of transferring federal prisoners to state courts. Such an objective can be realized only by uniform interpretation of the compact.

Id. at 678 (Cudahy, J., dissenting) (footnotes omitted). This need for uniformity in the interpretation of an interstate compact is a consideration that receives little attention in the circuit cases. Perhaps it is a factor that ought to be weighted a great deal more heavily in determining whether a "statutory claim" is cognizable on habeas.

Bhupendra C. PATEL, also known as "Ben" Patel, and Meena B. Patel, his wife, Plaintiffs–Appellants,

v.

Richard C. GAYES, M.D., Thomas Engel, M.D., and Evangelical Health Systems Corporation, doing business as Good Shepherd Hospital, an Illinois corporation, Defendants–Appellees.

No. 91–2210.

United States Court of Appeals, Seventh Circuit.

Argued April 2, 1992.

Decided Jan. 21, 1993.

Rehearing and Rehearing En Banc Denied March 29, 1993.

Patient and spouse brought medical malpractice action against physician, alleg-

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

NORTHERN DISTRICT OF INDIANA

ORRIN SCOTT REED

V.

DICK CLARK; and
INDIANA ATTORNEY GENERAL

JUDGMENT IN A CIVIL CASE

CASE NUMBER: S90-00226

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED BY CHIEF JUDGE ALLEN SHARP

that petitioner take nothing and the writ is DENIED.

September 21, 1990
Date

RICHARD E. TIMMONS
Clerk

(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ORRIN SCOTT REED, Petitioner	)	
v.	)	Civil No. S 90-226
DICK CLARK; and INDIANA ATTORNEY GENERAL, Respondents	)	

MEMORANDUM AND ORDER

On May 22, 1990, pro se petitioner, Orrin Scott Reed, filed a petition seeking relief under 28 U.S.C. § 2254.[1] The return filed on August 27, 1990, demonstrates the necessary compliance with Lewis v. Faulkner, 689 F.2d 100 (7th Cir. 1982). Six volumes of the state court record were filed, which the court has examined pursuant to the mandates of Townsend v. Sain, 372 U.S. 293 (1963). The court has also examined the rebuttal filed by the petitioner on September 6, 1990. Indeed, the eighteen-page rebuttal is quite lawyerlike in both form and substance and the

[1] Orrin Scott Reed certainly is not a stranger to the judiciary system. See Reed v. State, (Unpublished) 840 F.2d 920 (7th Cir. 1988); Reed v. Morton, (Unpublished) 808 F.2d 837 (7th Cir. 1986), cert. denied, 481 U.S. 1020 (1987); United States v. Reed, 392 F.2d 865 (7th Cir.), cert. denied, 393 U.S. 984 (1968); Reed v. State, (Unpublished) 546 N.E.2d 132 (Ind.App. 1989); Reed v. State, 491 N.E.2d 182 (Ind. 1986); Reed v. Duckworth, et al., S 88-77; Reed v. Duckworth, S 86-683; Reed v. State, S 86-682; Reed v. State, S 86-444; Reed v. Morton, S 86-6; Reed v. Pearson, S 85-100; Reed v. Rayl, S 84-682; Reed v. McLochlin, S 83-423; Reed v. United States, S 72-139; Reed v. United States, S 69-117.

author is to be commended even if this court does not ultimately abide by its request.

Specifically, this court has five volumes of the record of proceedings in the Fulton Circuit Court before the Honorable Douglas B. Morton and has one volume of proceedings in the same court before the Honorable R. Alexis Clark, Special Judge.

The petitioner was convicted of theft and found to be a habitual offender. He was sentenced to a term of 34 years in prison. A direct appeal was taken to the Supreme Court of Indiana, which unanimously affirmed the aforesaid conviction in an opinion authored by Justice DeBruler and reported in Reed v. State, 491 N.E.2d 182 (Ind. 1986). On August 15, 1985, the petitioner filed a pro se petition for post-conviction relief alleging that the trial court had violated provisions of the Interstate Agreement on Detainers, and that he was denied effective assistance of counsel. On August 26, 1988, the post-conviction court denied the petition, and in an unpublished memorandum decision dated October 16, 1989, the Court of Appeals of Indiana affirmed the post-conviction court's denial. See Reed v. State, 546 N.E.2d 132 (Ind.App. 1989).

In the present petition, the petitioner attached a seven-page, fourteen-numbered paragraph document which is attached as Appendix "A" hereto for immediate and convenient reference. The plaintiff's petition on its face indicates that there are post-conviction proceeding pending in the state court.

However, upon examination of the opinion of Justice DeBruler in which he dealt with eight separate issues, and paralleling the opinion to the aforesaid petition in this case, it may be presumed that the issues presented have been exhausted, since the Attorney General of Indiana does not argue otherwise. The factual setting of the case, as stated by Justice DeBruler, beginning at page 183, is as follows:

> In June, 1979, the Wabash Valley Bank foreclosed on its security interest in a 1977 Ford pick-up truck, identification number F14 SCY 89 261. Wabash Valley Bank then sold the truck to the appellate for thirteen hundred dollars in cash. In August 1979, the First National Bank of Rochester loaned M. & S. Salvage four thousand dollars; the same truck became the collateral for the loan. Appellant signed the note. The First National Bank of Rochester regarded appellant as the owner of M. & S. Salvage, and the appellant had communicated to others that he was the owner of M. & S. Salvage.
>
> On October 6, 1979, appellant reported the same truck as stolen from a K-Mart parking lot in South Bend. Auto Owner's Insurance Company paid $4,660 on the resulting loss claim. Marsha L. Reed had title to the truck and the insurance company had issued the policy in her name. Marsha Reed was actually Marsha Lee, a woman with whom appellant was living at the time. The insurance proceeds were used to pay the remaining sum of $3,101.52 to the First National Bank of Rochester on the note that appellant signed.
>
> In February 1980, state police, in executing a search warrant on the premises of M. & S. Salvage, discovered a license plate, issued to Marsha Reed for the same truck. A computer search indicated to the police that the truck had been stolen. A woman, who lived with an M. & S. Salvage employee, told the police that she saw M. & S. Salvage employees transferring parts from a blue pick-up truck to a red pick-up truck. Robert

> Smith, another employee, told the police that he had paid the appellant $300.00 for a frame and running gear on which he had placed his blue cab. Smith never received a certificate of title from appellant for the frame. Subsequently, Smith sold the reconstructed truck, to Shelton under the old truck's certificate of title. Police in Tennessee located Shelton's truck, and then discovered a concealed vehicle identification number on its frame. The number was F14 SCY 89 261; the same number on the frame of the truck appellant reported stolen from the K-Mart parking lot in South Bend.

Reed, 491 N.E.2d at 183-84. Justice Stewart, speaking for the Supreme Court of the United States in Jackson v. Virginia, 443 U.S. 307 (1979), stated:

> A judgment by a state appellate court rejecting a challenge to evidentiary sufficiency is of course entitled to deference by the federal courts, as is any judgment affirming a criminal conviction. But Congress in § 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law. The federal habeas corpus statute presumes the norm of a fair trial in the state court and adequate state postconviction remedies to redress possible error. See 28 U.S.C. § 2254(b), (d). What it does not presume is that these state proceedings will always be without error in the constitutional sense. The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur -- reflecting as it does the belief that the "finality" of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right -- is not one that can be so lightly abjured.

Id. at 323. The Supreme Court in Jackson held:

> We hold that in a challenge to a conviction brought under 28 U.S.C. § 2254 --if the settled procedural prerequisites for such a

> claim have otherwise been satisfied -- the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof beyond a reasonable doubt.

Id. (footnote omitted). See also Sumner v. Mata, 449 U.S. 539 (1981); Dooley v. Duckworth, 832 F.2d 445 (7th Cir. 1987), cert. denied, 485 U.S. 967 (1988); United States ex rel. Haywood v. O'Leary, 827 F.2d 52 (7th Cir. 1987); Bryan v. Warden, Indiana State Reformatory, 820 F.2d 217 (7th Cir.), cert. denied, 484 U.S. 867 (1987); Shepard v. Lane, 818 F.2d 615 (7th Cir.), cert. denied, 484 U.S. 929 (1987); and Perri v. Director, Department of Corrections, 817 F.2d 448 (7th Cir.), cert. denied, 484 U.S. 843 (1987).

A review of the record in the light most favorable to the prosecution convinces the court that a rational trier of fact could readily have found the petitioner guilty beyond a reasonable doubt of theft.

Part II of the Justice DeBruler's opinion at page 185 deals with the issue as to the circumstantial evidence instruction. It was not an error under the law of Indiana to refuse the petitioner's circumstantial evidence instruction and it is not a constitutional error. See Bell v. Duckworth, 861 F.2d 169 (7th Cir. 1988), cert. den. ___ U.S. ___, 109 S.Ct. 1552 (1989). A very recent decision has pointed application. In Williams v. Chrans, 894 F.2d 928, 937 (7th Cir. 1990) states:

> We have jurisdiction to issue writs of habeas corpus only on the ground that the petitioner is "in custody in violation of the Constitution

or laws or treaties of the United States." 28 U.S.C. § 2241(c), 2254(a).

The second issue presented deals with the state trial court's final instruction number 12, which is dealt with in Part III of Justice DeBruler's opinion at page 185. This is a question of state law and in no sense does the giving of the same constitute reversible error. It is a fairly stock instruction that is frequently given in criminal cases in both state and federal courts.

The next issue has to do with an issue under Faretta v. California, 422 U.S. 806 (1975), as it pertains to the petitioner's constitutional right under the Sixth Amendment of the Constitution of the United States to represent himself. Justice DeBruler dealt with that issue in Part VII of his opinion.

The petitioner requested that he be allowed to represent himself at a pre-trial conference held on August 1, 1983. Certainly, that right is guaranteed in Justice Stewart's opinion for the majority in Faretta, id. In his opinion, Justice Stewart acknowledged the hard reality that most defendants who take up that adventure do themselves more harm than good. Judge Douglas B. Morton, confronted with the very difficult proposition of a defendant in a criminal case requesting to represent himself, inquired into the petitioner's determination to represent himself, and granted said request after giving the petitioner extensive warnings about the dangers of self-representation. A copy of that portion of the state trial transcript is attached

hereto and marked Appendix "B". In addition to the warnings, Judge Morton appointed Jere Humphrey, an attorney known to this court as an able and experienced lawyer, as stand-by counsel for the petitioner. Finally, Judge Morton ordered the petitioner released on bond to prepare his case approximately three (3) weeks prior to the commencement of trial.

Upon review of the record, it is clear to this court that Judge Morton certainly did what is required under Faretta v. California, 422 U.S. at 806. See Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990); Prihoda v. McCaughtry, No. 89-3479, slip op. (7th Cir., August 14, 1990). It is absurd that the petitioner is now arguing that Judge Morton violated his constitutional rights by letting him represent himself; especially in light of the fact that the petitioner requested that he be allowed to represent himself despite Judge Morton's warnings against self-representation. As evidenced by the record, the petitioner chose to represent himself, consequently, he may not turn around and complain that the quality of his own defense amounted to a denial of "effective assistance of counsel." Faretta, 422 U.S. at 834, n. 46.[2]

The next contention of the petitioner is ineffective assistance of appellate counsel, pursuant to Evitts v. Lucey, 469 U.S.

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[2]To no one's surprise, the petitioner, being the experienced litigator that he was, finally realized that he was in over his head, and at the end of the trial, requested that the trial court allow stand-by counsel, Jere Humphrey, to completely take over his defense. (T.R. 1061).

387, (1985). In a challenge to counsel's performance on appeal, the presumption of effective assistance counsel will be overcome only when ignored issues are clearly stronger than those presented. Mikel v. Thieret, 887 F.2d 733, 736 (7th Cir. 1989) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). The petitioner has failed to demonstrate that any issue not raised by counsel was significant in any degree, either by itself or by comparison with the issues which were argued. Mikel v. Thieret, 887 F.2d at 736. In post-conviction proceedings, the petitioner was represented by the state public defender's office, and it is not his province to here contend the ineffective assistance of counsel during post-conviction proceedings. See Pennsylvania v. Finley, 481 U.S. 551 (1987). Accordingly, the petitioner's claim of ineffective assistance of appellate counsel must fail.

As he did in the Supreme Court under Issue I of Justice DeBruler's opinion at pages 184-85, the petitioner raises an issue with regard to his detainer. Justice DeBruler has very carefully delineated that issue. A copy of that portion of Justice DeBruler's opinion is attached hereto and marked Appendix "C".

Upon review of the record, this court concludes that a significant amount of the delay of trial is attributable to the many motions filed either by the petitioner or filed on the petitioner's behalf. Article VI(a) of the Interstate Agreement on Detainers contains the following provision concerning the tolling of time periods:

> In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as a prisoner is unable to stand trial as determined by the court having jurisdiction of the matter.

18 U.S.C.App. III, § 2, Article VI(a). The Court of Appeals for the Seventh Circuit defines the underscored language to include "all those periods of delay occasioned by the defendant," and specifically, "the periods of delay occasioned by the ...motions filed on behalf of the defendant..." United States v. Nesbitt, 852 F.2d 1502 (7th Cir. 1988); United States v. Roy, 830 F.2d 628, 634 (7th Cir. 1987). See also United States v. Dawn, 900 F.2d 1132 (7th Cir. 1990). Accordingly, the petitioner's argument that the respondents failed to comply with the time restrictions of the Interstate Agreement on Detainers must fail.

The petitioner also complains that the state trial court erred in (1) admitting into evidence a business record of a phone conversation of the petitioner, (2) refusing to admit into evidence a police report, (3) refusing to allow the petitioner to cross-examine the police officer as to the location of the confidential vehicle identification number, and (4) admitting into evidence certified copies of petitioner's prior convictions during the habitual offender proceedings.

Justice DeBruler dealt with the evidentiary rulings in Part IV, V, and VI of his opinion at pages 186 through 187. As a general proposition, this type of ruling is committed to the discretion of state trial judges in criminal proceedings and

generally does not rise to the level of federal constitutional error unless they constitute a pervasive undermining of the basic fairness of the proceedings. In this case, it isn't even a close question. These rulings were altogether within the framework of the law of Indiana and no constitutional error is here presented.

The petitioner also complains that the state trial court erred in admitting into evidence part of the trial certified copies of his prior convictions during the bifurcated habitual offender. He contends that there is no evidence establishing that he was the same individual identified in the records admitted. This court is well aware of the mandates of Williams v. Duckworth, 738 F.2d 828 (7th Cir. 1984), cert. denied, 469 U.S. 1229 (1985). See also Jones v. Thieret, 846 F.2d 457 (7th Cir. 1988). In these proceedings, it was established that the petitioner was the same individual as the one named in the records of prior conviction by reference to his social security number, birthdate, and a certified copy of driver's record and name. This court does not conceive that this evidence fails the test announced by Judge Swygert, speaking for the majority in a divided court in Williams, 724 F.2d at 1439. No constitutional error is presented with reference to this challenge to the habitual offender proceedings.

Lastly, the petitioner complains that he was not tried within 120 days of his arrival in Fulton County, in violation of the provisions of the Interstate Agreement on Detainers, Indiana Code § 35-33-10-4. Again, Justice DeBruler has carefully

delineated the actual situation with reference to that issue in Part I of his opinion at pages 184-185. In any event, the petitioner has not made a constitutional challenge to a timely trial under the constitutional mandates of Barker v. Wingo, 407 U.S. 514 (1972). Justice DeBruler has found that petitioner's trial was within the appropriate time frame under the law of Indiana, and there is nothing in the Constitution of the United States that causes a different conclusion. This conviction is neither undermined by reason of petitioner's being denied any so-called pre-transfer hearing.

This court has carefully reviewed the entirety of this case and has given special attention to the rebuttal filed on September 6, 1990. Much of the effort is simply one to reargue the merits of the case. It must be reminded that this court is not a court of direct review, but that 28 U.S.C. § 2254 provides for a limited, narrow, but all important constitutional review of issues that have been exhausted under the mandates of such cases as Rose v. Lundy, 455 U.S. 509 (1982).

While the arguments are clearly and cogently presented in an orderly fashion, they are not convincing. Therefore, no basis is presented for the granting of a writ under 28 U.S.C. § 2254.

Writ **DENIED. IT IS SO ORDERED.**

DATED: September 21, 1990

CHIEF JUDGE
NORTHERN DISTRICT OF INDIANA

cc: Reed
Schoening
Order Book

O. Scott REED, Appellant,

v.

STATE of Indiana, Appellee.

No. 484S143.

Supreme Court of Indiana.

April 7, 1986.

Defendant was convicted by jury in the Fulton Circuit Court, Douglas B. Morton, J., of theft and was determined to be habitual offender, and received four-year sentence, which trial court enhanced by 30 years because of habitual offender determination, and defendant appealed. The Supreme Court, DeBruler, J., held that: (1) defendant failed to preserve for appeal issue that defendant was not tried within 120–day limit required by Interstate Agreement on Detainers; (2) circumstantial evidence was sufficient to prove defendant's identity as caller so as to render transcript of telephone conversation admissible; and (3) evidence was sufficient to prove beyond reasonable doubt that defendant was same person who committed prior felonies introduced at habitual offender hearing.

Affirmed.

1. Criminal Law ⇐1044.2(1)

Defendant's motions alleging various violations of Interstate Agreement on Detainers [IC 35–33–10–4], did not preserve for appeal objection that defendant was not brought to trial within 120 days, where defendant failed to raise such objection on date trial was set or date trial was reset, or during remainder of 120–day time limit. IC 35–33–10–4, 35–33–10–4, Art. 5(d, h) (1982 Ed.).

2. Criminal Law ⇐814(17)

Trial court was not required to give circumstantial evidence instruction in trial for theft, where there was direct evidence that defendant negotiated purchase of truck for $1,300, negotiated $4,000 loan with truck as collateral, reported truck as stolen and sold truck's frame. IC 35–43–4–2 (1982 Ed.).

3. Criminal Law ⇐822(16)

Instruction that jury was sole judge of weight of evidence, that evidence with greatest weight was evidence which most strongly convinced jury of truthfulness and that jury should consider all facts and circumstances in evidence to determine what evidence was of greatest weight did not confuse jury as to reasonable doubt standard applicable in trial for theft, where other instructions stated that jury must be convinced of guilt of defendant beyond reasonable doubt before defendant could be convicted. IC 35–43–4–2 (1982 Ed.).

4. Criminal Law ⇐386

Identity of declarant in telephone conversation may be established by circumstantial evidence.

5. Criminal Law ⇐386

Circumstantial evidence was sufficient to prove defendant's identity as caller so as to render transcript of telephone conversation admissible in trial for theft, where telephone conversation transcript revealed that speaker had knowledge that only defendant would be likely to know concerning his address, phone number, social security number, details and features of truck and reported theft of truck.

6. Witnesses ⇐271(3)

Refusal to admit into evidence on cross-examination police report mentioned on direct examination did not substantially impinge upon defendant's right to cross-examination in trial for theft, where defendant conducted thorough and productive cross-examination of police officer concerning such report. U.S.C.A. Const.Amend. 6.

7. Witnesses ⇐271(1)

Refusal to allow defendant to cross-examine police officer concerning location of confidential vehicle identification number, following admission into evidence of photograph of vehicle identification number, for purpose of showing possible alteration of vehicle identification number, was proper in theft trial. U.S.C.A. Const.Amend. 6; IC 35–43–4–2 (1982 Ed.).

8. Constitutional Law ⇐268.1(5)

Permitting defendant to represent himself, which resulted in difficulty in subpoenaing and deposing witnesses, due to fact that defendant was incarcerated, did not deny defendant due process of law, where court appointed standby counsel for defendant and ordered that standby counsel provide defendant with legal material and be available to file necessary motions and other pleadings, but defendant refused to properly use standby counsel. U.S.C.A. Const.Amends. 5, 14.

9. Criminal Law ⇐1203.17

Defendant's sentences for prior felony convictions were proven beyond reasonable doubt during habitual offender proceeding, where sentence for earlier felony was referred to in transcript of such cause and sentence for later felony was referred to in verdict form from later cause. IC 35–50–2–8 (1982 Ed.).

10. Criminal Law ⇐1203.17

Evidence that defendant's social security number, birthdate and physical description matched information contained in presentence report for prior larceny conviction, presentence report for larceny conviction mentioning that defendant previously received sentence for arson, which was sentence and sentencing date mentioned in transcript of prior conviction for setting fire to automobile, transcript of earliest conviction indicating year of defendant's birth, and fact that names on prior felonies were nearly identical to defendant's name was sufficient to prove beyond reasonable doubt that defendant was same person who committed prior felonies introduced at habitual offender hearing. IC 35–50–2–8 (1982 Ed.).

Jere L. Humphrey, Plymouth, for appellant.

Linley E. Pearson, Atty. Gen., John D. Shuman, Deputy Atty. Gen., Indianapolis, for appellee.

DeBRULER, Justice.

This is a direct appeal from a conviction of theft, a class D felony, I.C. § 35–43–4–2, and from a habitual offender determination, I.C. § 35–50–2–8. A jury tried the case. Appellant received a four year sentence for theft which the trial court enhanced by thirty years because of the habitual offender determination.

Appellant raises eight issues on appeal: (1) whether trial court erred in not discharging him pursuant to the Interstate Agreement on Detainers Act; (2) whether trial court erred in refusing his tendered "circumstantial evidence" instruction; (3) whether trial court erred in giving a "greatest weight of the evidence" instruction in a criminal case; (4) whether trial court erred in admitting into evidence a transcript of a telephone conversation which allegedly involved him; (5) whether trial court erred in not admitting into evidence on cross-examination a report mentioned on direct examination; (6) whether trial court erred in not permitting him to cross-examine a police officer concerning the location of a confidential vehicle identification number, (7) whether trial court denied him due process in permitting him to represent himself without, at the same time, affording him direct access to witnesses and legal facilities; (8) whether trial court erred in admitting into evidence at the habitual offender proceeding State's Exhibits # 1, # 2, # 3, # 4, and # 5.

These are the facts from the record that tend to support the determination of guilt. In June 1979, the Wabash Valley Bank foreclosed on its security interest in a 1977 Ford pick-up truck, identification number F14 SCY 89 261. Wabash Valley Bank then sold the truck to the appellant for thirteen hundred dollars in cash. In August 1979, the First National Bank of Rochester loaned M. & S. Salvage four thousand dollars; the same truck became the collateral for the loan. Appellant signed the note. The First National Bank of Rochester regarded appellant as the owner of M. & S. Salvage, and the appellant had

communicated to others that he was the owner of M. & S. Salvage.

On October 6, 1979, appellant reported the same truck as stolen from a K-Mart parking lot in South Bend. Auto Owner's Insurance Company paid $4,660 on the resulting loss claim. Marsha L. Reed had title to the truck and the insurance company had issued the policy in her name. Marsha Reed was actually Marsha Lee, a woman with whom appellant was living at the time. The insurance proceeds were used to pay the remaining sum of $3,101.52 to the First National Bank of Rochester on the note that appellant signed.

In February 1980, state police, in executing a search warrant on the premises of M. & S. Salvage, discovered a license plate, issued to Marsha Reed for the same truck. A computer search indicated to the police that the truck had been stolen. A woman, who lived with an M. & S. Salvage employee, told the police that she saw M. & S. Salvage employees transferring parts from a blue pick-up truck to a red pick-up truck. Robert Smith, another employee, told the police that he had paid the appellant $300.00 for a frame and running gear on which he had placed his blue cab. Smith never received a certificate of title from appellant for the frame. Subsequently, Smith sold the reconstructed truck to Shelton under the old blue truck's certificate of title. Police in Tennessee located Shelton's truck, and then discovered a concealed vehicle identification number on its frame. The number was F14 SCY 89 261; the same number on the frame of the truck appellant reported stolen from the K-Mart parking lot in South Bend.

I

[1] Appellant argues that the trial court should have discharged him pursuant to the Interstate Agreement on Detainers (IAD) I.C. § 35-33-10-4 because he was not tried within 120 days of his arrival in Fulton County. The pertinent sections of the statute are set forth here:

> Art. 1—[It] is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints.
>
> Art. 4(c)—In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty [120] days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.
>
> Art. 5(c)—If the appropriate authority shall refuse or fail to accept temporary custody of said person or in the event that an action on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article 3 or Article 4 hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

The record indicates that the Federal Penitentiary at Terre Haute transferred him to Fulton County on April 27, 1983. On May 4, 1983, on May 23, 1983, and on June 20, 1983, appellant filed separate motions alleging that his transfer to Fulton County was in violation of the IAD; he also requested a hearing on the matter. On June 27, 1983, the trial court set the trial date for September 13, 1983; which was beyond the requisite 120 day period. Appellant did not object to this trial setting. On June 29, 1983, he filed a Motion for Relief from Violations. In the motion he alleged violations of IAD § 35-33-10-4, art. 5(d) and 5(h). These allegations related to appellant's care while in the custody of Fulton County and not to the 120 day limit. On July 15, 1983, the trial court in an order made the following ruling concerning appellant's previous IAD motions.

> "That upon defendant's motion for dismissal or 'relief from violations' pursuant to the Detainer's Act, the Court does now deny the said motions; defendant has failed to provide any showing of the terms of the Act relied upon or the particular acts of the State to which he objects. There appearing on its face no violation of such Act, the court does rule accordingly."

Despite this ruling's emphasis on appellant's failure to allege specific violations of the IAD, as of this ruling, we discern that appellant alleged one specific violation: that is that Fulton County violated article 5(d) and 5(h) of the IAD in regards to the type of care he was to receive while in their custody. However, it was not until July 26, 1983, that appellant made a general demand that trial be held within the time limits of the IAD. In a pretrial conference, on August 1, 1983, the court conducted an extensive hearing on the IAD, however, appellant did not reiterate his objection based on the time limit. Subsequently, the trial court reset the trial date from September 13, 1983, to September 19, 1983. Appellant did not object to this resetting. Between August 1, 1983, and August 29, 1983, appellant's actions indicated that he intended to proceed to trial on the date as reset i.e. he filed a motion in limine, a petition for subpoena, a petition for depositions upon oral examination, and a petition for production of documentary evidence. On August 29, 1983, he filed an Affidavit of Emergency, alleging that the 120 day period had passed and that the charges against him be dismissed.

A defendant applying for discharge pursuant to the Interstate Agreement on Detainers may be precluded from relief if he fails to object to a date beyond the requisite period at the time the date was set or during the remainder of the time limit. See *Scrivener v. State* (1982), Ind., 441 N.E.2d 954, 956; *Pethtel v. State* (1981), Ind.App., 427 N.E.2d 891.

[1] Appellant claims all of his objections based on the IAD properly preserve the "120 day limit" issue for appeal. Appellant is incorrect. The relevant times when appellant should have objected were on June 27, 1983, the date the trial was set, and August 1, 1983, the date the trial was reset. However, appellant did not object at these times to the setting or resetting of the trial date beyond the requisite 120 day period. Appellant's Affidavit of Emergency on August 29, 1983, alleging the expiration of the 120 day period did not qualify as a timely objection to preserve his rights under the IAD.

II

[2] Appellant argues that the trial court erred in refusing his tendered "circumstantial evidence" instruction.

> "Instructions upon circumstantial evidence are not required to be given where the evidence of guilt is direct and positive or where some is direct and some is circumstantial." *Hitch v. State* (1972), 259 Ind. 1, 12, 284 N.E.2d 783, 789.

Faught v. State (1979), 271 Ind. 153, 390 N.E.2d 1011, 1017.

Here, there is direct evidence that appellant negotiated the purchase of the truck for $1300, that he negotiated a $4,000 loan with the truck as collateral, that he reported the truck as stolen, and that he sold the truck's frame. The existence of this direct evidence permitted the case to be submitted to the jury without a discrete instruction on how to deal with a case resting solely upon circumstantial evidence.

III

[3] Appellant argues that the trial court erred in giving a "greatest weight of the evidence" instruction in a criminal case. Appellant objected to the instruction at trial. He contends that the instruction is similar to a "preponderance of the evidence" instruction in a civil case and that, as a result, the instruction necessarily confused the jury as to the "proof beyond a reasonable doubt" standard.

The challenged instruction No. 12 is set forth here:

> You are the sole judges of the weight of the evidence. The evidence that has the greatest weight is that evidence which

most strongly convinces you of its truthfulness. You should consider all of the facts and circumstances in evidence to determine what evidence is of the greatest weight.

The weight of the evidence is not necessarily determined by the number of witnesses testifying concerning it. You may find that the testimony of a smaller number of witnesses has more strongly convinced you of its truthfulness and is therefore of the greater weight.

This instruction does not discuss the standard of proof required for conviction; it merely stresses that the truthfulness of evidence is more important than the quantity of evidence. Furthermore, we do not discern that this instruction confused the jury as to the "reasonable doubt" standard, especially in light of the other instructions the trial court submitted to the jury stating the jury must be convinced of the guilt of the defendant beyond a reasonable doubt before he can be convicted. The trial court clearly instructed the jury as to the proper standard of proof to be applied in a criminal case.

IV

Appellant argues that the trial court erred in admitting into evidence over his objection a transcript of a telephone conversation which allegedly occurred between him and an insurance company representative. He contends that the State did not lay a sufficient foundation to identify him as one of the speakers.

[4, 5] Identity of the declarant in a telephone conversation may be established by circumstantial evidence. *Indiana Union Traction v. Scribner* (1911), 47 Ind.App. 621, 93 N.E. 1014, *Greenberg v. Greenberg* (1921), 79 Ind.App. 218, 133 N.E. 18, See also, 79 A.L.R.3d 79.

> [If] the witness has received .... a telephone call out of the blue from one who identified himself as "X" this is not sufficient authentication of the call as in fact coming from X. The requisite additional proof may take the form of testimony by the witness that he is familiar with X's voice and that the caller was X. *Or authentication may be accomplished by circumstantial evidence pointing to X's identity as the caller, such as if the communication received reveals that the speaker had knowledge of facts that only X would be likely to know.*

McCormick et al. on Evid.3d HBLE, § 226.

Here, the State has proven appellant's identity as the caller circumstantially because the telephone conversation transcript reveals that the speaker had knowledge that only appellant would be likely to know i.e. his address, phone number, social security number, the details and features of the truck, and the reported theft of the truck.

V

[6] Appellant argues that the trial court erred in not admitting into evidence on cross-examination a police report mentioned on direct examination.

On direct examination, Officer Phenice referred to a police report, and he testified about the circumstances surrounding the report as follows:

Q. Did he (Gerald Smith) also volunteer anything as to where the truck came from.

A. He did. He mentioned several names. However, I only mentioned one name in the report. I did not write notes at the time. I wrote them when I went back to the office. I did cue in on one particular name that was mentioned.

Q. Who was that?

A. It was Denver Manning.

Q. Why did you cue in on that so to speak?

A. The name Denver Manning had been in other investigations I was involved with in the Gary area. I did not know who was being particularly investigated in Trooper Rayl's case. The name Manning however was put in my reports simply because that was the name I was familiar with. I

was not familiar with the other names that were mentioned.

Q. Do you remember any of the other names?

A. I do remember Scott Reed's name.

On cross-examination Officer Phenice identified his report, earlier testified to, Exhibit A, and testified that it said nothing about Scott Reed. Appellant then attempted to introduce the actual written report in order to demonstrate that it referred only to Denver Manning as a possible suspect. The State objected on the grounds that the report was superfluous in that the Officer had thoroughly testified as to its contents, and therefore, it would distract the jury.

> It is well settled that limiting the scope of cross-examination is a function within the sound discretion of the trial judge. Only upon a showing of a clear abuse of such discretion will this Court order a reversal. *Haak v. State* (1981), Ind., 417 N.E.2d 321, 322, *Cobb v. State* (1981), Ind., 412 N.E.2d 728, 739.

Wireman v. State (1982), Ind., 432 N.E.2d 1343.

Here, although the trial court refused to admit the report into evidence, appellant conducted a thorough and productive cross-examination of Officer Phenice concerning this report. Consequently, the trial court's refusal to admit the report into evidence did not substantially impinge upon appellant's right to cross-examination.

VI

[7] Appellant argues that the trial court erred in not permitting him to cross-examine a police officer concerning the location of a confidential vehicle identification number (VIN).

On direct-examination, the trial court admitted into evidence State's Exhibit # 10, a photograph of the VIN, without objection. On cross-examination, the appellant asked the police officer the following questions:

Q. Exactly where is it (the VIN) located?

A. Well, that's confidential information.

Q. Well, I don't think it should be confidential in this trial.

A. Well, that would be up to the judge

...

Court: What would the relevancy of the location be in this trial, Mr. Reed? ...

Mr. Reed: Well, If ... uh ... there are several Possibilities one that the man ... there could be more than one of these numbers, for instance. It could have been altered or made quite accessible to someone else to alter it or change it. I think that it's a piece of evidence in this case ... I should be able to cross-examine and use full knowledge about it.

The trial court then disallowed the question on the basis that there was no connection between its precise location and its possible alteration.

Appellant relies on *Burton v. State* (1984), Ind., 462 N.E.2d 207. There, only five to seven out of eleven characters of the VIN were discernible from a photograph of the VIN that the trial court admitted into evidence over defendant's objection. The defendant requested the location of the VIN in order to examine all of its characters so that he could effectively cross-examine the Officer about the VIN. The vehicle was in the custody of the police. This Court ruled that the defendant had a right to inspect the VIN on the vehicle so that he could conduct an effective cross-examination.

Here, appellant did not request to inspect the VIN on the truck, he merely wanted to know the location of the VIN. Verbal testimony at trial describing the location of the VIN, by itself, does not tend to prove or disprove that the VIN was altered; consequently, the precise location of the VIN was not then relevant, and the trial court did not prejudice appellant's right to cross-examination.

VII

[8] Appellant argues that the trial court denied him due process of law in permitting him to represent himself without, at the same time, affording him direct access to witnesses and legal facilities.

After inquiring about appellant's decision to represent himself and after giving appellant extensive warnings about the dangers of self-representation, the court appointed stand-by counsel for appellant. The trial court also ordered that stand-by counsel should provide appellant with legal materials and be available to file necessary motions and other pleadings.

Most of appellant's contentions concern the difficulty he had in subpoenaing and deposing witnesses. The source of his difficulty was the fact that he was incarcerated. Any problem appellant may have had would have been non-existent if he had used his stand-by counsel properly. The purpose of stand-by counsel is to lessen the barriers resulting from incarceration, and it provides a defendant with the opportunity to improve the quality of his self-representation. See *Engle v. State* (1984), Ind., 467 N.E.2d 712.

The trial court did not deny appellant due process of law.

VIII

[9] Appellant argues that the trial court erred in admitting into evidence during the habitual offender proceeding State's Exhibits # 1, # 2, # 3, # 4, and # 5.

> Certified copies of judgments or commitments containing the same or similar name as defendant's may be introduced to prove the commission of prior felonies. However, there must be other supporting evidence to identify defendant as being the same person named in the documents. *Estep v. State* (1979), 271 Ind. 525, 394 N.E.2d 111; *Smith v. State*, (1962), 243 Ind. 74, 181 N.E.2d 520.

State's Exhibit # 1 consists of an information and a transcript from *State v. Orrin Scott Reed*, Cause No. 2619. The information is for "setting fire to an auto," and it reveals that the date of commission for the offense was June 24, 1951. The transcript reveals that the defendant pled guilty on April 13, 1954, that he received a one to three year sentence on April 13, 1954, and that he was 22 years of age.

State's Exhibit # 2 consists of an information, a verdict form, and a pre-sentence report from *State v. Orin Scott Reed*, Cause No. 3977. The information is for grand larceny, and it reveals that the date of commission for the offense was January 14, 1959. The verdict form reveals that a jury found the defendant guilty on February 11, 1960, and that he received a one to ten year sentence on February 11, 1960. The pre-sentence report revealed the defendant's social security number as 310–30–1049, his birth date as July 18, 1931 and other descriptive information, including a conviction for arson for which he was sentenced one to three years on April 13, 1954.

State's Witness Atchley, the Fulton County Jailer, testified that Appellant told him that his social security number was 310–30–1049. State's Witness Rayl, a state police officer, testified that he transported appellant to Fulton County from the Federal Penitentiary in Terre Haute. In addition, he testified that the penitentiary records indicated that appellant's birth date was July 18, 1931.

State's Exhibit # 6 consists of appellant's driving record from the Department of Motor Vehicles. It contains appellant's social security number, 310–30–1049, birth date, July 18, 1931, and other descriptive information.

Appellant objected to State's Exhibits # 1, and # 2 on the basis that the sentences had not been demonstrated and that there was no evidence demonstrating that appellant was the same person that committed the felonies described in the exhibits.

To begin with, it is clear that the sentences were proven beyond a reasonable doubt. The sentence for the 1951 felony is referred to in the transcript in State's Exhibit # 1, and the sentence for the 1959 felony is referred to in the verdict form in State's Exhibit # 2.

[10] Second, there is sufficient evidence to prove beyond a reasonable doubt that appellant was the same person who committed the 1951 felony and the 1959 felony. The social security number, evidenced by the testimony of Atchley, by a telephone conversation transcript introduced into evidence at the guilt phase of the trial, and by appellant's driving record, matches the social security number referred to in the presentence report for the 1959 felony. The birthdate, evidenced by Rayl's testimony and by appellant's driving record, matches the birth date referred to in the presentence report for the 1959 felony. Also, the description of appellant's appearance in his driving record is substantially similar to the description of his appearance in the presentence report for the 1959 felony. This is sufficient evidence to identify appellant as the perpetrator of the 1959 felony.

The presentence report for the 1959 felony mentions that appellant received a one to three year sentence for arson on April 13, 1954. This is the sentence and the sentencing date mentioned in the transcript of the 1951 felony. The offense of arson is also substantially similar, if not the equivalent, to the offense of setting fire to an auto. Also, the transcript of the 1951 felony indicates that appellant was born in 1931 or 1932. This is sufficient to identify appellant as the perpetrator at the 1951 felony. Furthermore, it should be noted that the names on the 1951 felony and 1959 felony are nearly identical to appellant's name. This tends to give evidentiary force to the argument that appellant was the perpetrator of the 1951 felony and the 1959 felony.

Because of our conclusion that the State demonstrated that appellant committed the 1951 felony and the 1959 felony, we need not address appellant's contentions concerning State's Exhibits # 3, # 4, and # 5. Conviction and sentence affirmed.

GIVAN, C.J., and PIVARNIK, SHEPARD and DICKSON, JJ., concur.

In the Matter of William C. RUNYON.

No. 780 S 223.

Supreme Court of Indiana.

April 7, 1986.

In an attorney disciplinary proceeding, the Supreme Court held that forcing entry into former wife's apartment striking former wife with club, holding wife at gunpoint, being convicted on three felony counts of possession of firearms not registered under federal law constitute engagement in illegal conduct involving moral turpitude and engagement in conduct adversely reflecting on fitness to practice law and warrant disbarment.

Disbarment ordered.

Attorney and Client ⇐58

Forcing entry into former wife's apartment striking former wife with club, holding wife at gunpoint, being convicted on three felony counts of possession of firearms not registered under federal law constitute engagement in illegal conduct involving moral turpitude and engagement in conduct adversely reflecting on fitness to practice law and warrant disbarment. Code of Prof.Resp., DR1–102(A)(3, 6); 26 U.S.C.A. §§ 5861(d), 5871.

No appearance for respondent.

William G. Hussman, Jr., Staff Atty., Indianapolis, for the Indiana Supreme Court Disciplinary Comm'n.

PER CURIAM.

This disciplinary matter is before us on a Verified Complaint for Disciplinary Action charging the Respondent with violating Disciplinary Rules 1–102(A)(3) and (6) of the *Code of Professional Responsibility for Attorneys at Law*. On December 14, 1981, pursuant to an agreed entry, the Respondent was suspended from the practice of law pending the outcome of this case.

STATE OF INDIANA

CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

DANIEL BOCK MEISER, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 317-232-1930

SUSAN KAREN CARPENTER
309 W. WASHINGTON
SUITE 501
INDIANAPOLIS IN 46204-0000

Cause Number

25A04-8903-PC-00095
LOWER CAUSE
58253 & 58255

REED, ORRIN SCOTT VS. STATE OF INDIANA

You are hereby notified that the SUPREME COURT has on this day 4/30/90

APPELLANT'S PETITION TO TRANSFER IS DENIED. RANDALL T. SHEPARD, CHIEF JUSTICE. SHEPARD, C.J., DEBRULER, J., GIVAN, J., AND DICKSON, J., CONCUR. PIVARNIK, J., NOT PARTICIPATING.

WITNESS my name and the seal of said Court,

this 30TH day of APRIL, 1990

Clerk Supreme Court, Court of Appeals and Tax Court

INTERSTATE AGREEMENT ON DETAINERS

Pub. L. 91-538, §§ 1-8, Dec. 9, 1970, 84 Stat. 1397-1403, as amended by Pub. L. 100-690, title VII, § 7059, Nov. 18, 1988, 102 Stat. 4403

§ 1. Short title

This Act may be cited as the "Interstate Agreement on Detainers Act".

CODIFICATION

The Interstate Agreement on Detainers is also set out in sections 24-701 to 24-705 of the District of Columbia Code.

§ 2. Enactment into law of Interstate Agreement on Detainers

The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining in substantially the following form:

"The contracting States solemnly agree that:

"ARTICLE I

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

"ARTICLE II

"As used in this agreement:

"(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"(b) 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

"(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

"ARTICLE III

"(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided*, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

"(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

"(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have

been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

"(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

"ARTICLE IV

"(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

"(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving State who has lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

"(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

"(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not affirmatively consented to or ordered such delivery.

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"ARTICLE V

"(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

"(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

"(1) Proper identification and evidence of his authority to act for the State into whose temporary custody this prisoner is to be given.

"(2) A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

"(c) If the appropriate authority shall refuse or fail to accept temporary custody of said

person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

"(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

"(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

"(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

"(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

"(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.

"ARTICLE VI

"(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

"(b) No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

"ARTICLE VII

"Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the State, information necessary to the effective operation of this agreement.

"ARTICLE VIII

"This agreement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

"ARTICLE IX

"This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party State or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any State party hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters."

§ 3. Definition of term "Governor" for purposes of United States and District of Columbia

The term "Governor" as used in the agreement on detainers shall mean with respect to the United States, the Attorney General, and with respect to the District of Columbia, the Mayor of the District of Columbia.

TRANSFER OF FUNCTIONS

"Mayor of the District of Columbia" was substituted for "Commissioner of the District of Columbia" pursuant to section 421 of Pub. L. 93-198. The Office of Commissioner of the District of Columbia, as established by Reorg. Plan No. 3, of 1967, was abolished as of noon Jan. 2, 1975, by Pub. L. 93-198, title VII, § 711, Dec. 24, 1973, 87 Stat. 818, and replaced by the Office of Mayor of the District of Columbia by section 421 of Pub. L. 93-198, classified to section 1-241 of the District of Columbia Code.

§ 4. Definition of term "appropriate court"

The term "appropriate court" as used in the agreement on detainers shall mean with respect to the United States, the courts of the United States, and with respect to the District of Columbia, the courts of the District of Columbia, in which indictments, informations, or complaints, for which disposition is sought, are pending.

§ 5. Enforcement and cooperation by courts, departments, agencies, officers, and employees of United States and District of Columbia

All courts, departments, agencies, officers, and employees of the United States and of the District of Columbia are hereby directed to enforce the agreement on detainers and to cooperate with one another and with all party States in enforcing the agreement and effectuating its purpose.

§ 6. Regulations, forms, and instructions

For the United States, the Attorney General, and for the District of Columbia, the Mayor of the District of Columbia, shall establish such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this Act.

REFERENCES IN TEXT

This Act, referred to in text, is Pub. L. 91-538, Dec. 9, 1970, 84 Stat. 1397, known as the "Interstate Agreement on Detainers Act".

TRANSFER OF FUNCTIONS

"Mayor of the District of Columbia" was substituted for "Commissioner of the District of Columbia" pursuant to section 421 of Pub. L. 93-198. The Office of Commissioner of the District of Columbia, as established by Reorg. Plan No. 3 of 1967, was abolished as of noon Jan. 2, 1975, by Pub. L. 93-198, title VII, § 711, Dec. 24, 1973, 87 Stat. 818, and replaced by the Office of Mayor of the District of Columbia by section 421 of Pub. L. 93-198, classified to section 1-241 of the District of Columbia Code.

§ 7. Reservation of right to alter, amend, or repeal

The right to alter, amend, or repeal this Act is expressly reserved.

REFERENCES IN TEXT

This Act, referred to in text, is Pub. L. 91-538, Dec. 9, 1970, 84 Stat. 1397, known as the "Interstate Agreement on Detainers Act".

§ 8. Effective Date

This Act shall take effect on the ninetieth day after the date of its enactment.

REFERENCES IN TEXT

This Act, referred to in text, is Pub. L. 91-538, Dec. 9, 1970, 84 Stat. 1397, known as the "Interstate Agreement on Detainers Act".

The date of its enactment, referred to in text, means Dec. 9, 1970.

§ 9. Special Provisions when United States is a Receiving State

Notwithstanding any provision of the agreement on detainers to the contrary, in a case in which the United States is a receiving State—

(1) any order of a court dismissing any indictment, information, or complaint may be with or without prejudice. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: The seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of the agreement on detainers and on the administration of justice; and

(2) it shall not be a violation of the agreement on detainers if prior to trial the prisoner is returned to the custody of the sending State pursuant to an order of the appropriate court issued after reasonable notice to the prisoner and the United States and an opportunity for a hearing.

(Pub. L. 91-538, § 9, as added Pub. L. 100-690, title VII, § 7059, Nov. 18, 1988, 102 Stat. 4403.)

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ORRIN S. REED,

Petitioner-Appellant,

v.

DICK CLARK and INDIANA ATTORNEY GENERAL,

Respondents-Appellees.

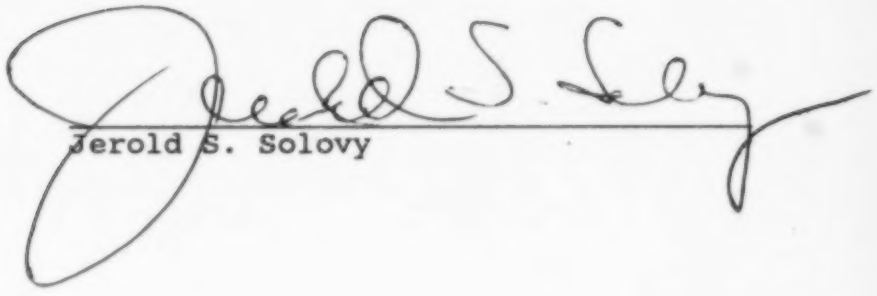
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CERTIFICATE OF SERVICE

I, Jerold S. Solovy, a member of the Bar of this Court, hereby certify that on this 26th day of July, 1993, copies of the foregoing "Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit" and "Motion for Leave to Proceed In Forma Pauperis" in the above entitled case were served by first class mail, proper postage prepaid, upon attorneys for respondents:

Wayne E. Uhl
Deputy Attorney General
Indiana Attorney General
329 State House
200 W. Washington Street
Indianapolis, Indiana 46204-2794

I further certify that all parties required to be served have been served.



Jerold S. Solovy

Jerold S. Solovy
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One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

[redacted] for Writ
[redacted] States Court
Seventh Circuit

[redacted] IN OPPOSITION TO PETITION FOR [redacted] OF CERTIORARI

[redacted]
Attorney General of Indiana

[redacted]
Deputy Attorney General
(Counsel of Record)

219 State House
200 W. Washington St.
Indianapolis, IN 46204
(317) 232-6333

Counsel for Respondents

QUESTION PRESENTED

Whether a state prisoner is entitled to federal habeas corpus relief based on an alleged violation of the Interstate Agreement on Detainers ("IAD"), where the state courts found the issue to have been waived as a matter of state law and where the prisoner has not established actual prejudice resulting from the violation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 93-5418

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ORRIN SCOTT REED, Petitioner,

v.

ROBERT FARLEY, Superintendent, Indiana State Prison, et al., Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Orrin Scott Reed was charged in Fulton County, Indiana, with theft by defrauding an insurance company with a false report of a stolen truck. Reed was also charged with being an habitual offender under Indiana law.

Reed was in federal prison at the time. Indiana has adopted the Interstate Agreement on Detainers ("IAD"). Ind. Code § 35-33-10-4. Pursuant to a detainer and a subsequent request for temporary custody sent by the Fulton County prosecutor to the warden of the penitentiary, Reed was delivered into the custody of Fulton County officials on April 27, 1983.

At an initial hearing in May 1983, Reed stated that he would prefer to represent himself (with an attorney "as assistant") but that his custody prevented him from preparing for trial. Bond was denied due to his continuing federal custody.

At no time during the 120 days following his arrival in Fulton County did Reed alert the trial court to the possibility that he would not be tried within 120 days as required by Article IV(c) of the IAD,[1] although he had multiple opportunities to do so.

At the initial hearing in May 1983, the judge asked for an estimate of the length of trial, which was to be set in "August, perhaps September." Reed did not object to the possibility of a setting in September. At a pretrial conference on June 27, 1983, the trial court set the trial to begin on September 13, 1983, which would have been the 140th day after Reed's arrival in Fulton County. Reed did not object. At another conference on August 1, 1993, the trial court reset the trial to begin on September 19, 1983. Reed did not object.

Instead, Reed waited until August 29, 1983, the 124th day after his arrival, to file an "Affidavit of Emergency" and "Petition for Discharge," citing for the first time Article IV(c) and its 120-day time limit. At a subsequent conference

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[1] Article IV(c) of the IAD provides that trial of a prisoner transferred under that article

> shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

The 120th day after Reed's arrival in Fulton County was August 25, 1983.

the trial judge expressed surprise at Reed's invocation of the 120-day rule. The judge stated that he had not seen any reference to 120 days in any of Reed's motions and that he was not even aware that the IAD contained a 120-day time limit. Reed's motion for discharge was denied.

Rather than specifically objecting to his trial date prior to the running of the 120-day period, the record suggests that Reed deliberately attempted to ambush the trial court. Before and after he arrived in Fulton County, Reed deluged the court with lengthy handwritten motions, some of which mentioned the IAD in a very general and sometimes veiled way. He asserted, for example, that his transfer was "contrary to the authority" of the IAD. He insisted that his trial be held "within legal guidelines" of the IAD and once vaguely referred to the "limited time left for trial."

Reed's ability to cite specific provisions of the IAD is beyond question, for his motions included specific citations to IAD provisions or alleged rights under the IAD other than the 120-day time limit. He argued, for instance, that his transfer was invalid because he did not receive a pretransfer hearing at the federal penitentiary. He also argued that conditions at the county jail violated the obligation to "care" for him under Article V of the IAD.

Reed further aggravated the situation by persistently suggesting to the trial court that he would be better able to prepare his defense after his federal sentence expired, which he first said would occur in August 1983 and later said would

occur about August 31, 1983. The trial court, which originally denied bond due to the federal sentence, eventually set bond conditioned on Reed's release from all other custody. Bond was posted on September 28, 1983.

When the case came on for trial on September 19, 1983, the court and parties expressed concern over a newspaper article about the case. After a lengthy discussion the trial judge stated his inclination to delay the trial one week, but Reed requested that it be delayed until October or November and the trial was reset to begin on October 18, 1983.

Reed was convicted of theft and found to be an habitual offender, resulting in a sentence of 34 years. The Indiana Supreme Court affirmed the conviction. On the IAD issue the court held that Reed had waived his right to trial within 120 days by failing to object to the setting of trial dates beyond the 120-day limit. Reed v. State, 491 N.E.2d 182, 184-85 (Ind. 1986) (Pet. App. A-21 - A-22).

Reed next petitioned for federal habeas corpus relief, which was denied by the district court. The district court found that Reed's contribution to the delay between transfer and trial generally foreclosed his time limit contentions. (Pet. App. A-16 - A-17.) The district court also specifically noted that Reed's claim was not based on the speedy trial guarantee of the Sixth Amendment and that the Indiana Supreme Court's holding that the trial was timely under state law did not contravene the federal Constitution. (Pet. App. A-17 - A-18.)

The court of appeals affirmed, holding that claims under the IAD do not merit federal habeas corpus relief unless the petitioner establishes that the state courts "fail[ed] to entertain and resolve" them. Reed v. Clark, 984 F.2d 209, 213 (7th Cir. 1993) (Pet. App. A-5). Rehearing was denied over the dissent of two of the eleven judges in regular active service. 984 F.2d at 213-14 (Pet. App. A-5 - A-6).

REASONS FOR DENYING THE WRIT

I. REED'S WAIVER OF HIS IAD CLAIM IN THE STATE COURTS PROVIDED AN ADEQUATE AND INDEPENDENT STATE GROUND FOR THE DENIAL OF RELIEF.

The Indiana Supreme Court did not reach the merits of Reed's 120-day time limit claim under the IAD based on its finding that he had waived it.[2] After discussing the procedural history of the case, the court held:

> A defendant applying for discharge pursuant to the Interstate Agreement on Detainers may be precluded from relief if he fails to object to a date beyond the requisite period at the time the date was set or during the remainder of the time limit. See Scrivener v. State (1982), Ind., 441 N.E.2d 954, 956; Pethtel v. State (1981), Ind. App., 427 N.E.2d 891.

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[2] In his Petition, Reed relies entirely on the 120-day time limit as the IAD violation at issue in this case. The Respondents do not understand the Petition to include Reed's claim, raised in the lower federal courts, that he was entitled to a pretransfer hearing at the federal penitentiary. See Reed v. Clark, 984 F.2d at 213 (Pet. App. A-5).

> Appellant claims all of his objections based on the IAD properly preserve the "120 day limit" issue for appeal. Appellant is incorrect. The relevant times when appellant should have objected were on June 27, 1983, the date the trial was set, and August 1, 1983, the date the trial was reset. However, appellant did not object at these times to the setting or resetting of the trial date beyond the requisite 120 day period. Appellant's Affidavit of Emergency on August 29, 1983, alleging the expiration of the 120 day period did not qualify as a timely objection to preserve his rights under the IAD.

Reed v. State, 491 N.E.2d 182, 185 (Ind. 1986) (Pet. App. A-22).

This Court has long held that it will not consider an issue of federal law on direct review of a state court judgment if that judgment rests on a state-law ground which is both independent of the federal claim and and adequate basis for the court's decision. Harris v. Reed, 489 U.S. 255, 260 (1989). In the context of federal habeas review of state convictions, that rule is expressed in terms of "procedural default," although the roots are the same. Id., 489 U.S. at 262; see Wainwright v. Sykes, 433 U.S. 72 (1988).

The Indiana Supreme Court's holding that Reed had waived his IAD claim was a "plain statement" of its reliance on the adequate and independent state-law ground of waiver. There is no suggestion that the court considered the merits in the alternative, and it relied entirely on Indiana cases in reaching its conclusion.

The Respondents have raised Reed's waiver as an impediment to habeas review at every stage of the federal

litigation.[3] In any event, a State's failure to plead procedural default does not prevent the federal habeas court from invoking the doctrine in the interests of federalism and comity. Granberry v. Greer, 481 U.S. 129 (1987).

This Court should continue to follow its practice of refusing to review cases in which the state courts have relied on the independent state ground of waiver, and for this reason alone should deny certiorari here.

II. AFTER THIS COURT'S DECISION IN BRECHT v. ABRAHAMSON, THERE IS NO MEANINGFUL SPLIT AMONG THE CIRCUITS ON THE ISSUE OF WHETHER A TECHNICAL VIOLATION OF THE IAD WILL MERIT HABEAS CORPUS RELIEF.

The core "conflict" posited by the Petitioner as existing before the court of appeals decided the instant case is between courts which have required a showing of actual prejudice before granting habeas corpus relief based on a violation of the IAD and those which have not. (Petition at 11-13.) Any case holding that prejudice is not required, however, is a dead letter after this Court's decision last Term in Brecht v. Abrahamson, 113 S.Ct. 1710 (1993). In any event, the appearance of a "split" was due to the failure of some courts to separately address the issue of relief.

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[3] Waiver under Indiana law was a key focus of the Respondents' argument in the court of appeals and the district court. See Reed v. Clark, 984 F.2d at 214 (Pet. App. A-5); Memorandum and Order of District Court at 10-11 (Pet. App. A-17 - A-18) (treating Indiana Supreme Court's disposition of issue as based on state law).

A. After Brecht There Is No Doubt That A Technical Violation Of The IAD Will Not Merit Habeas Relief In The Absence Of A Showing Of Actual Prejudice.

Any question about the requirement of actual prejudice in a federal habeas corpus case was resolved by this Court in Brecht v. Abrahamson, 113 S.Ct. 1710 (1993), which held that in habeas corpus proceedings the harmlessness of constitutional errors is evaluated under the less stringent standard of Kotteakos v. United States, 328 U.S. 750 (1946). Thus an error asserted in a habeas proceeding must have "had substantial and injurious effect or influence in determining the jury's verdict." 113 S.Ct. at 1722 (quoting Kotteakos, 328 U.S. at 776).

> Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice."

Id. (quoting United States v. Lane, 474 U.S. 438, 449 (1986)).

Any court of appeals decision holding that an IAD violation will merit habeas relief in the absence of a showing of actual prejudice has been effectively overruled by Brecht. If a constitutional error must be deemed harmless in the absence of actual prejudice, there can be no doubt that habeas relief is not available for per se violations of the nonconstitutional provisions of the IAD. Because the issue is controlled by a recent decision of this Court, certiorari should be denied.

B. There Is No Meaningful Split Among The Circuits In Any Event.

An overwhelming majority of the courts of appeals have applied a fairly uniform approach to habeas review of IAD claims, holding that an IAD violation will not merit relief unless the petitioner can establish actual prejudice to his basic right to a fair trial. The requirement of prejudice is based on this Court's precedents, which hold that the mere violation of a "law[] . . . of the United States" does not merit collateral relief unless "the defendant was prejudiced." Davis v. United States, 417 U.S. 333, 346 (1974); see Hill v. United States, 368 U.S. 424, 428 (1962).

Thus in Seymore v. State of Alabama, 846 F.2d 1355, 1359-60 (11th Cir.), cert. denied, 488 U.S. 1018 (1988), the Eleventh Circuit stated that it was joining the First, Second, Fourth, Eighth, Ninth and Tenth Circuits in holding that "various violations of the IAD are nonfundamental defects and -- absent a showing of some sort of prejudice -- are uncognizable in a federal habeas proceeding." 846 F.2d at 1359. In support of this statement the court in Seymore also cited decisions of the Sixth and Third Circuits. See Metheny v. Hamby, 835 F.2d 672 (6th Cir. 1987), cert. denied, 488 U.S. 913 (1988); Casper v. Ryan, 822 F.2d 1283, 1288-91 (3rd Cir. 1987), cert. denied, 484 U.S. 1012 (1988). Thus "actual prejudice" has been the uniform standard for habeas relief in nine of the circuits.

The Petitioner cites cases in which habeas relief was granted on the basis of an IAD violation, but fails to take into account the fact that those cases did not even address the separate issue of whether relief was appropriate, assuming instead that habeas relief is automatically available because the IAD is a "law[] . . . of the United States." See, e.g., Birdwell v. Skeen, 983 F.2d 1332, 1336 (5th Cir. 1993); Webb v. Keohane, 804 F.2d 413, 414 (7th Cir. 1986).

There is no question that the IAD is a federal law which can be the basis for federal jurisdiction to entertain an application for a writ of habeas corpus on the ground that the applicant is in custody in violation of the "laws . . . of the United States" under 28 U.S.C. §§ 2241(c)(3), 2254(a) and 2255. Carchman v. Nash, 473 U.S. 716, 719 (1985). But the habeas court is also required to "dispose of the matter as law and justice require," 28 U.S.C. § 2243, an equitable issue which cases such as Birdwell and Webb simply failed to consider.

The Seventh Circuit in this case recognized that its prior decisions, including Webb, did not address "the circumstances under which [an IAD] violation leads to collateral relief." Reed v. Clark, 984 F.2d at 211 (Pet. App. A-3). Other circuits have also distinguished cases which did not address the relief issue. See Seymore v. State of Alabama, 846 F.2d at 1359 n.7; Metheny v. Hamby, 835 F.2d at 674. If there is disparity in habeas relief granted, see Metheny v. Hamby, 488 U.S. 913, 913-14 (1988) (White, J., dissenting), it is because habeas respondents have not been arguing the relief

issue in every case, not because there are different standards being employed by the circuits.

The Petitioner is wrong, therefore, to characterize the prior state of the law as an "already-fractured split among the circuits" where a review of the cases he cites shows remarkable uniformity in the basic principle. This may be the reason for this Court's denial of certiorari in almost every case cited by the Petitioner, and for the same reason certiorari should be denied here.

III. THE EXTENT TO WHICH HABEAS CORPUS RELIEF IS AVAILABLE IS A MATTER OF STATUTORY CONSTRUCTION WHICH CAN BE RESOLVED BY CONGRESS.

This case does not present the Court with any question of constitutional law -- Reed has never claimed that his right to a speedy trial under the Sixth Amendment was denied. Neither does the case squarely present a question regarding the terms of the IAD itself.

Instead, the Petitioner is asking the Court to answer a question which is fundamentally one of statutory interpretation: What relief is available under 28 U.S.C. § 2254 for a violation of the IAD? As argued above, the courts of appeals have been fairly consistent in their approach. The Respondents are unaware of any effort in Congress to amend Section 2254 to require relief for per se IAD violations.

If the approach taken by the Seventh Circuit in this case is viewed as a departure from Congress' understanding of the scope of the writ of habeas corpus, Congress is free to

amend Section 2254 in a way which would clarify its intent. See Brecht, 113 S.Ct. at 1718-19 (discussing "various proposals" in Congress to affect standards of review in habeas cases). The Court should allow Congress the opportunity to consider the Seventh Circuit's decision and change the statute if it so desires.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT HABEAS REVIEW OF IAD VIOLATIONS TURNS ON WHETHER THE PETITIONER RECEIVED A FULL AND FAIR HEARING IN THE STATE COURTS.

Just last Term the Court reviewed the equitable principles which resulted in the rule of Stone v. Powell, 428 U.S. 465 (1976), which bars habeas corpus consideration of claims based on the Fourth Amendment exclusionary rule unless the petitioner can establish that the state courts did not provide a full and fair opportunity to litigate the issue. In Withrow v. Williams, 113 S.Ct. 1745 (1993), the Court declined to extend Stone to alleged violations of Miranda v. Arizona, 384 U.S. 436 (1966).

The Court reiterated in Withrow that Stone was based on a weighing of the costs of applying the exclusionary rule in collateral proceedings against any potential advantage of applying it there. 113 S.Ct. at 1750; Stone, 428 U.S. at 489-95. Key to this determination is the extent to which the "right" at issue safeguards "a fundamental trial right," 113 S.Ct. at 1753 (quoting United States v. Verdugo-Urquez, 494 U.S. 259, 264 (1990)), which serves "some value necessarily divorced from the correct ascertainment of guilt," 113 S.Ct. at 1753.

The IAD contains precisely the sort of extrajudicial rules which bear no necessary relation to the accuracy or fundamental fairness of the trial. Article I of the IAD itself states that its primary policy is to

> encourage the expeditious and orderly disposition of [untried] charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints.

IAD, Art. I. The same article condemns "uncertainties which obstruct programs of prisoner treatment and rehabilitation" and "difficulties in securing speedy trial of persons already incarcerated in other jurisdictions." Id.

While compliance with the IAD will usually avert a claim of the denial of a speedy trial under the Sixth Amendment, no court has ever suggested that the IAD is required to protect the Sixth Amendment right in the same sense that Miranda is necessary to safeguard the right against self-incrimination. The Sixth Amendment is self-enforcing, and the mechanistic provisions of the IAD are actually inconsistent with this Court's well-settled, flexible multi-factor analysis of speedy trial claims. See Doggett v. United States, 112 S.Ct. 2686, 2690-91 (1992); Barker v. Wingo, 407 U.S. 514 (1972).

Other provisions of the IAD are even further removed from the determination of guilt or innocence. The Petitioner's approach would permit habeas relief, for example, based on the IAD's provision that a transferred prisoner must be tried

before being returned to the original place of imprisonment. IAD, Art. IV(e). It cannot be seriously argued that this provision is crucial to the fundamental fairness of a trial.

On the other side of the Stone equation are the costs of collateral review, about which there can be no doubt. See, e.g., McCleskey v. Zant, 111 S.Ct. 1454, 1468-70 (1991). These costs are especially heavy in IAD cases, where the only remedy is dismissal with prejudice. Unlike the exclusion of evidence under the Fourth Amendment or Miranda, an IAD violation admits of no possibility of retrial.

Thus the court of appeals correctly concluded that the doctrine of Stone v. Powell applies to federal habeas corpus review of claimed violations of the IAD, and there is no need for this Court to exercise its supervisory authority to correct an erroneous decision of a lower court.

V. REED WOULD NOT BE ENTITLED TO HABEAS RELIEF UNDER ANY STANDARD OF REVIEW.

Review of this case by this Court would be an academic exercise because Reed is clearly not entitled to relief under any standard of review that might be adopted. Even beyond his clear waiver of the issue in the state courts, Reed has never credibly alleged that the failure to try him within 120 days adversely affected his ability to defend himself.

If the delay had any effect at all, it assisted Reed by postponing the trial until after he was released on bond. Reed incorrectly asserts that "the detainer" forced him to

prepare his defense from a jail cell even after his federal sentence expired. (Petition at 5 n.3, 13 n.6.) To the contrary, the trial court granted bond when the federal sentence expired (R. 430) and Reed posted bond on September 28, 1983 (R. 103). Ironically, therefore, the delay in the trial of the case permitted Reed time out of jail to prepare for the trial, which began on October 18, 1983.

Reed has never claimed, nor does he do so in his Petition, that specific evidence or witnesses were lost as a result of the trial of the case in October instead of August. Even if he could establish a technical violation of the 120-day provision, Reed does not even pretend to assert that the error had a "substantial and injurious effect on the jury's verdict" under Brecht, supra. This Court should not utilize its scarce resources to review this case in order to reach the same result reached by the court below, even if on different grounds.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(Counsel of Record)

October 1, 1993

ORIGINAL

(4)

Supreme Court, U.S.
FILED
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No. 93-5418

THE
THE UNITED STATES

Petitioner-Appellant,

v.

[illegible]
APPELLEE,
[illegible] Of Indiana,

Respondent-Appellee.

[illegible] RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 93-5418

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ORRIN SCOTT REED,

Petitioner-Appellant,

v.

ROBERT FARLEY, Superintendent, Indiana State Prison and PAMELA CARTER, Attorney General Of Indiana,

Respondent-Appellees.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Brief in Opposition ("Opposition"), offers no sound basis for denying certiorari because each of the arguments raised by respondents lacks merit. Thus, this Court should grant the petition for certiorari to resolve the persistent split among the circuits on the scope of collateral review for violations of the Interstate Agreement on Detainers ("IAD").

I. REED PROPERLY PRESERVED HIS IAD CLAIM FOR HABEAS REVIEW.

As the Seventh Circuit held, respondents waived any procedural default claim that they may have had. (Pet. App. 5 (noting that respondent failed to invoke procedural default as required by Wainwright v. Sykes, 433 U.S. 72, 90 (1977).)

See also Jenkins v. Anderson, 447 U.S. 231, 234 n.1 (1980) ("Considerations of judicial efficiency demand that a Sykes claim be presented before a case reaches this Court."). After the Seventh Circuit has reached the merits of this dispute, issued an opinion that is binding precedent on the federal district courts in three states, and created a circuit split worthy of this Court's attention, it is simply too late for respondents to assert procedural default claims to avoid this Court's review.[1]

II. THIS COURT'S DECISION IN BRECHT v. ABRAHAMSON IS INAPPLICABLE TO REED'S CLAIM.

Respondents are incorrect that the splintering of the circuits is a "dead letter" after Brecht v. Abrahamson,

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[1] In any event, the pro se petitioner did not waive the IAD violation by failing to make his objections orally, as respondents assert. On June 27, 1983, the trial judge specifically requested that petitioner not make oral motions and instead put them in writing. (R. 390-91.) Petitioner made all subsequent IAD objections in writing rather than orally.

Nor did petitioner deliberately attempt to "ambush" the court with the IAD violation, as respondents assert. (Opposition at 3.) The judge was first made aware of the IAD's requirements on March 3, 1983. (R. 10.) On that date, the trial judge signed an order in which he agreed to try petitioner "within the time specified in Article IV(c)" of the IAD. Id. As respondent recognizes, petitioner repeatedly sought relief under various provisions of the IAD from that time until the 120-day period ended on August 25, 1983. (Opposition at 3.) Indeed, petitioner filed three motions -- on July 7, July 26, and July 29 -- that specifically addressed the 120-day trial requirement. (R. 77-78 (noting detention for 2½ months and violation of IAD); R. 90 (requesting "trial be held within legal guidelines of the Agreement on Detainers" to prevent trial "beyond the limits as set forth [in the] Agreement on Detainer Act"); R. 99, 103 (referring to IAD, noting that he had been in custody over 3 months, and stating that there was "limited time left for trial within the laws.").)

113 S. Ct. 1710 (1993). (Opposition at 7.) Brecht addresses only "trial errors" -- errors which occur "during the presentation of the case to the jury." Brecht, 113 S. Ct. at 1717 (quoting Arizona v. Fulminante, 111 S. Ct. 1246, 1249 (1991)). Indeed, respondents quote this Court's limitation of the Brecht holding to "habeas relief based on trial error." (Opposition at 8 (quoting Brecht, 113 S. Ct. at 1722).)

The Brecht rationale should not be extended to non-trial errors such as IAD violations. This Court in Brecht held that state courts were particularly well-suited to the difficult task of determining whether trial errors affected the outcome of trials. Id. at 1721. In contrast to trial errors, IAD violations do not benefit from deference to state courts. As prior federal decisions demonstrate, the existence of an IAD violation is simple for a federal court to ascertain and to resolve. See, e.g., Birdwell v. Skeen, 983 F.2d 1332, 1341 (5th Cir. 1993); Cody v. Morris, 623 F.2d 101, 103 (9th Cir. 1980). Thus, Brecht should not be applied in this case to thwart Supreme Court review.

III. THE ISSUE HERE IS ONE OF STATUTORY INTERPRETATION WHICH SHOULD BE RESOLVED BY THIS COURT.

Implicitly recognizing that petitioner is correct that interstate compacts such as the IAD cannot be changed by Congress alone, respondents argue that this Court should let Congress amend 28 U.S.C. § 2254, the habeas statute, to "clarify" whether IAD violations should be cognizable.

(Opposition at 11-12.) But there is no need to "clarify" the habeas statute, because that statute is perfectly clear as it is written: violations by state courts of federal "laws," such as the IAD, should be reviewed. 28 U.S.C. § 2254 (habeas covers "violation of . . . laws . . . of the United States"). As Justice Frankfurter observed, "[i]t is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress." Brown v. Allen, 344 U.S. 443, 500 (1953). This Court should not, as respondents suggest, require litigants to seek congressional action every time a lower court misinterprets a statute.

IV. RESPONDENTS CORRECTLY RECOGNISE THAT THERE IS A LEGITIMATE DIFFERENCE OF OPINION ON THE SCOPE OF COLLATERAL REVIEW OF IAD VIOLATIONS.

Respondents set forth several reasons why they believe that the decision below is correct. They make no effort, however, to demonstrate that the decision below is consistent with the other circuits that have considered IAD violations on collateral review. In fact, prior to the decision below, no circuit had ever applied Stone v. Powell to IAD violations. Cf. Fasano v. Hall, 615 F.2d 555, 559 n.* (1st Cir.), cert. denied, 449 U.S. 867 (1980) (declining to apply Stone to IAD violations).[2/] This case is worthy of

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[2/] Respondents are no more successful in their attempt to reconcile the conflicting approaches that existed prior to the Seventh Circuit's decision. In that attempt, they ignored both the Seventh Circuit's own recognition of the existing circuit split (Pet. App. 3) and the request by one Seventh Circuit judge for this Court to provide "firm guidance" on "a difficult problem upon which the circuits are in disarray." (Pet. App. 6.)

review by this Court based on the novel opinion below and the well-defined positions set out in the briefs.

V. PETITIONER IS ENTITLED TO HABEAS RELIEF UNDER OTHER INTERPRETATIONS OF THE IAD.

Respondents assert that petitioner would not be entitled to relief under any interpretation of the IAD because petitioner was not prejudiced by the violation. In so doing, respondents disregard the plain wording of the IAD, which does not require a showing of prejudice. Under the IAD, all courts of the United States -- not merely courts on direct review -- are directed to dismiss state court indictments, informations, or complaints when trial is not commenced within a 120-day period.[3/] 18 U.S.C. App. §§ 2, 5, at 703-05. (Pet. App. at 29-31.) Moreover, respondents' argument merely highlights the harshness of the decision below, which denies relief irrespective of whether petitioner demonstrates that he was prejudiced.

In any event, as the petition explained, petitioner was prejudiced by the IAD violation. Absent the Indiana detainer, petitioner would have been in a federal community center while he was awaiting trial. (R. 53, 328, 339-40.) In that less restrictive confinement, he would have had greater access to law materials and potential witnesses. Instead, he was held in a county jail until shortly before

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[3/] The IAD does provide that the 120-day period can be extended "for good cause shown." Art. IV, 18 U.S.C. App. § 2, at 703 (Pet. App. 29.) The Indiana trial court did not find "good cause" here. (Pet. App. 1-2.)

his trial commenced. As the Indiana trial court itself recognized, "the defendant [was] incapable of presenting the kind of defense which he . . . contemplated . . . because of his incarceration." (R. 83; see also R. 339 (Indiana state court acknowledges that "there is a world of difference between a prison and a half-way house.").) Thus, petitioner was prejudiced by the IAD detainer and violation.

CONCLUSION

For the reasons set forth above, as well as those set forth in the petition, petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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Dated: October 21, 1993

No. 93-5418

In The

Supreme Court of the United States

October Term, 1993

ORRIN SCOTT REED,

Petitioner,

v.

ROBERT FARLEY, Superintendent Indiana State Prison, and PAMELA CARTER, Attorney General Of Indiana,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed July 26, 1993
Certiorari Granted November 8, 1993

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CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

DATE	FILINGS – PROCEEDINGS
12/15/82	Information filed Against Orrin Scott Reed for theft
12/23/82	Motion for Assistance filed and granted
02/25/83	Reed's Petition for Appointment of Counsel, dated February 23, 1983, filed
04/28/83	Bench Warrant returned showing arrest of Reed on April 27, 1983
05/09/83	Initial Hearing; Jere Humphrey to undertake representation of Reed in such capacity as may be appropriate
06/27/83	Pre-trial Hearing held; Court notes receipt of handwritten motions from Reed dated May 4, 1983, May 23, 1983, June 8, 1983, and June 20, 1983 and takes motions under advisement; trial set for September 13, 1983
06/29/83	Reed's Motion for Relief Of Violations, dated June 29, 1983, filed
07/08/83	Reed's Motion for Relief of Violations, dated July 7, 1983, filed
07/15/83	Order denying Reed's Motions
07/25/83	Reed's Petition for Relief of Violations, dated July 26, 1983, filed
08/01/83	Reed's Petition for Revision of Pre-trial Procedures and Relief of Violations, dated July 29, 1983, filed

08/01/83	Pre-trial Hearing held; trial date set for September 19, 1983
08/11/83	Reed's Petition for Subpoena For Depositions Upon Oral Examination and for Production of Documentary Evidence, dated August 10, 1983, filed
08/19/83	Reed's Motion in Limine, dated August 18, 1983, filed
08/24/83	Reed's Motion in Limine, dated August 19, 1983, filed
08/29/83	Reed's Petition for Discharge and Petition for Bond Discharge filed
09/13/83	Pre-trial Hearing held, pending motions considered
09/19/83	Pre-trial Hearing held; trial reset for October 18, 1983 due to pretrial publicity
10/18/83	Trial commences in Circuit Court of Fulton County
10/22/83	Jury returns verdict of guilty to theft and habitual offender charges
11/14/83	Circuit Court of Fulton County sentences Reed to 34 years with credit for 192 days previously served
01/14/84	Reed's Motion to Correct Errors Filed in Circuit Court of Fulton County
01/26/84	Circuit Court of Fulton County enters Order denying Motion to Correct Errors
08/15/85	Reed's Petition for Post-Conviction Relief filed in Circuit Court of Fulton County
04/07/86	Opinion and Judgment filed by the Indiana Supreme Court affirming conviction

08/26/88	Circuit Court of Fulton County denies Motion for Post-Conviction Relief
10/27/88	Reed's Motion to Correct Errors in Circuit Court filed
12/14/88	Circuit Court of Fulton County denies Motion to Correct Errors
10/16/89	Indiana Court of Appeals denies appeal of Motion to Correct Errors
04/30/90	Indiana Supreme Court denies Reed's Motion to Transfer Proceedings
05/22/90	Reed's Petition for Writ of Habeas Corpus filed in District Court for the Northern District of Indiana
09/21/90	Opinion and Judgment filed by the District Court for the Northern District of Indiana
01/19/93	Opinion and Judgment filed by the United States Court of Appeals for the Seventh Circuit
04/27/93	Rehearing and Rehearing In Banc denied by the United States Court of Appeals for the Seventh Circuit

STATE OF INDIANA	)	IN THE FULTON CIRCUIT COURT
COUNTY OF FULTON	) SS.)	1983 GENERAL TERM
STATE OF INDIANA	)	
VS.	)	CAUSE NO.
O. SCOTT REED	)	S-82-53 & S-82-55

EXHIBIT "A"

Agreement on Detainers: Form V

Five copies. Signed copies must be sent to the prisoner and to the official who has the prisoner in custody. A copy should be sent to the Agreement Administrator of the state which has the prisoner incarcerated. Copies should be retained by the person filing the request and the judge who signs the request.

REQUEST FOR TEMPORARY CUSTODY

Thomas F. Keohane, Jr., Warden — U.S. Penitentiary
(Warden-Superintendent-Director) — (Institution)

Terre Haute, Indiana 47808
(address)

Please be advised that Orrin Scott Reed, who is presently an inmate of your institution, is under [indictment] [information] [complaint] in the Fulton Circuit Court, of which I
(jurisdiction)

am the Prosecuting Attorney inmate is therein charged
(title of prosecuting officer)
with the [offense] [offenses] enumerated below:

Offense

Theft, Fulton Circuit Court Cause No. S-82-55

_____

_____

I propose to bring this person to trial on this ~~[indictment]~~ [information] ~~[complaint]~~ within the time specified in Article IV(c) of the Agreement.

In order that proceedings in this matter may be properly had, I hereby request temporary custody of such person pursuant to Article IV(a) of Agreement on Detainers.

I hereby agree that immediately after trial is completed in this jurisdiction I will return the prisoner directly to you or allow any jurisdiction you have designated to take temporary custody. I agree also to complete Form IX, the Notice of Disposition of a Detainer, immediately after trial.

Signed: /s/ Richard A. Brown

Title: Prosecuting Attorney, Fulton County, IN

I hereby certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV (a) and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in

accordance with its terms and the provisions of the Agreement on Detainers.

DATED: March 3, 1983

Signed: /s/ Douglas B. Morton
~~(Judge)~~
Judge of the Fulton
Circuit Court

* * *

PETITION FOR WRIT OF HABEAS CORPUS,
AND DISMISSAL OF CHARGES
[Dated] May 4, 1983
(Caption Omitted In Printing)

Comes now, O. Scott Reed, defendant, and moves the court to enter an order dismissing the pending charges under Cause #S-82-55 for the following reasons:

That petitioner was in fact transferred from the U.S. penitentiary, a Federal jurisdiction, under Federal Authority for the purpose of hearings, and possible trial on the above cause, to the Fulton County Jail, Rochester, Indiana.

That this transfer did in fact take place on April 27, 1983.

That this transfer was in fact unlawful, and in fact contrary to the authority of the Agreements on Detainers Act by which this court has ordered petitioner confined.

That petitioner has in fact been held 7 days to date, unlawfully, without any hearings, being brought before the court, or to answer petitioners request for appointment of counsel, properly filed on February 23, 1983, for relief of improper confinement, and for unlawful restrictions from legal process guaranteed by the laws of the U.S., and with no indication of any relief of these violations from the above court.

That petitioner is being restricted from his freedom to enter society, unlawfully, by the denial of proper hearings, and improper confinement, and refusal of court to appoint counsel. (See petition for appointment of counsel filed in the above court 2-23-83).

That petitioner is, and has been, restricted from proper access to legal procedures to seek relief from the above violations.

That the above court, and the prosecutor are involved in improper "Conflict of Interest" pertaining to the arrest, transfer, and confinement of petitioner, unlawfully, and against both State and Federal law.

For the above violations, petitioner requests immediate hearing before the court, dismissal of pending charges, and all other violations of petitioner removed and ordered corrected.

Petitioner has filed Forma Pauperis procedure with this Court, and has sought all proper lief [sic] before this Court in petition filed February 23, 1983.

Respectfully submitted,

/s/ O. Scott Reed

Proof of Service:

A copy is served to the above court for delivery to the office of the prosecutor.

The above is true to the best of my knowledge.

/s/ O. Scott Reed

* * *

In the Fulton Circuit Court

CAUSE NO. S-82-53 & S-82-55

(Caption Omitted In Printing)

INITIAL HEARING

BEFORE THE HONORABLE

DOUGLAS B. MORTON

May 9, 1983

APPEARANCES:

For the State of Indiana – Richard A. Brown

[2] COURT:

I have two cause numbers before me – Cause No. S-82-55 which is State of Indiana vs. O. Scott Reed as it relates to a charge of theft and S-82-53 which is an Information for Habitual Offender.

What is your age, Mr. Reed?

MR. REED:

Fifty-one.

COURT:

You were charged by Information of the offense of theft and that is a Class D felony under the laws of the State of Indiana and you've indicated to me that you have received a copy of that?

MR. REED:

Yes, I did.

COURT:

You've also been charged with the Indiana Habitual Offender statute. That is not a particular class felony, but it is an enhancement statute. Did you read your copies of those charges?

MR. REED:

They were read to me.

COURT:

You are here for initial hearing preliminary to the prosecution of the crimes charged against you. That means you will be informed of the nature of the charges against you. The statutes under which the Informations were drawn will be read to you, arrangements will be made for your representation and [3] I will at the conclusion of these proceedings enter preliminary pleas of not guilty in your behalf.

You are now in the Fulton County jail?

MR. REED:

Yes, I am.

COURT:

How long have you been there?

MR. REED:

Two weeks.

COURT:

Twelve days at this point?

MR. REED:

Yes.

COURT:

How have you been treated at the jail?

MR. REED:

The food's great . . . surprisingly so. The sheriff is extraordinarily humane. My communications are very nearly totally limited, such as with my family visiting . . . this type of thing. I won't complain about the general conditions . . . not at this time.

COURT:

You were transferred here on a writ of assistance filed with this court from the Terre Haute federal prison, is that correct?

MR. REED:

Yes, sir.

[4] COURT:

How long had you been in custody?

MR. REED:

Three years approximately.

COURT:

Three?

MR. REED:

Three years. I'd like to bring to the Court's attention the one thing that the reason I am locked up isn't because

of my sentence in Terre Haute. It is directly because of this detainer. I filed a motion with this Court last week – a writ of habeas corpus, so forth, asking for an attorney for a hearing. I would have been to a half way house in January With my mandatory release date in August of this year, I am entitled to six months half way house and the only thing that kept me from going there . . . as a matter of fact, I was in the process of being released when this detainer was dropped on me. So the sole reason I am in jail at this moment is this detainer . . . on this charge brought by this court.

COURT:

Court's don't bring charges. Prosecutors bring charges.

(Additional Court Comments Omitted In Printing)

* * *

[14] COURT:

Can you think of any attorneys locally that wouldn't have a conflict of interest in representation of them?

MR. BROWN:

Not if all (inaudible). The only thing that I knew of that Ted was involved in was just as county attorney when he was selling the old hospital and I'm not so sure that . . . I don't know what went on then . . . whether that was an adversary relationship or not. I don't think he's involved in any law suits as such.

MR. REED:

No, as it turned out there was kind of a fraud involved. I mean I was completely swindled out of money as the case turned out – by Marsha.

MR. BROWN:

But beyond that I can't think of anybody that wouldn't (inaudible) around here that would do that kind of work . . . do criminal work.

COURT:

Do you know Jere Humphrey?

MR. REED:

I don't believe so.

[15] COURT:

He's an attorney from Plymouth. I'm going to contact him. He will be the first attorney I contact. I am going to seek to appoint him to represent you in this matter. Whoever we put in is going to have some miles and so it's going to be subject to their acceptance. They'll need to know that, but. he will be the first that I contact. He may well be down within a day or two to conduct an interview of you.

That would be the time that you would talk with him also concerning your requests relating to habeas corpus and release. The initial presentation that you made concerning it indicates that you would be in a half-way house right now . . .

MR. REED:

Yes, I would.

COURT:

. . . for all purposes and I understand there is a world of difference between a prison and a half-way house.

MR. REED:

Yes, sir, there is. You're free . . . (inaudible) running around.

COURT:

No, you're not . . . for all of my purposes you are still within the custody of . . . in your case, it would be the federal government.

MR. REED:

Yes, sir.

COURT:

And therefore that is not a release. That particular argument may be subject to development and that is something you're going to have to take up with Mr. Humphrey, but it's [16] not on its face something that indicates to me that you are subject to immediate release because on its face, you have just told me that you are not subject to immediate release. You are subject to release to a half-way house.

MR. REED:

Well, my release concerns that, I believe, go anywhere I wish during the days. I check in at 11:00 at night

and stay there until morning. I work under normal employment during the day.

COURT:

I know how half-way houses work, but for the purposes that I deal with it's not a release. That's what I need to explain to you.

MR. REED:

(Inaudible) restriction of my rights though by being locked up against a certain amount of freedom.

* * *

[17] COURT:

I'll discuss with you the rights that you have in the matter. First of all, if your preliminary plea of not guilty becomes a regular plea, then we'll schedule a trial and all of the rights that we've talked about here will apply for your benefit. Do you understand that?

MR. REED:

Yes.

COURT:

On the other hand if you choose to waive all of your rights today or at any later time and enter a plea of guilty, then we won't have a trial because then you'd be admitting you did the things you're charged with. Do you understand the difference between a plea of guilty and a plea of not guilty?

MR. REED:

Yes.

COURT:

If you choose to proceed upon a plea of not guilty or if you do nothing, then this case would be set for trial as soon as possible and under our present rules that requires a case to be heard at trial within the next 140 days. Do you understand that?

MR. REED:

Yes.

[24] * * *

COURT:

Now, Mr. Reed, you believe you understand what the maximum penalty for these offenses could be?

MR. REED:

Yes, thirty-two years is it plus whatever the special circumstance?

COURT:

The Court could find aggravating circumstances and make a sentence on the theft charge for a total of four years. In addition, on the habitual offender charge you could receive a consecutive term of thirty years . . . a total of thirty-four years.

MR. REED:

Yes.

COURT:

Do you understand what the minimum penalty for this could be?

[25] MR. REED:

Well, as I understand it . . . it's a compulsory prison sentence of a year?

COURT:

No. If you are found guilty of the theft charge and it's reduced for sentencing purposes to an A Misdemeanor, then it's not a second felony conviction. It's a misdemeanor and at that point it would still be possible for you to receive a suspended sentence and probation . . . a lot of range we're talking about. . . .

MR. REED:

O.K. Yes.

COURT:

. . . . from a suspended sentence all the way to thirty-four years which is a long time.

MR. REED:

Because I would die in a prison with this long sentence.

[26] * * *

MR. REED:

O.K. I would like to ask the Court for the process in which can be worked out, I'm sure, with the sheriff in

where I may talk to witnesses and so forth myself concerning this trial and all this pre-trial motions and so forth.

COURT:

I am going to leave that for you to talk over with Mr. [27] Humphrey or whoever eventually accepts the case for you and that will be considered at an early opportunity where we'll discuss how the procedures in the case will work. I am going to enter a Not Guilty plea in your behalf at this time. I am going to select June 27 as a Omnibus date in this case. The The [sic] Omnibus date is a date from which all other dates are fixed in the case and it's probably a phrase that you are entirely unfamiliar with.

MR. REED:

Right.

COURT:

The special significance that it will have to you is that at this time I am going to schedule a pre-trial conference for 1:30 p.m. that day and I'll direct your attendance at that.

The Court is also going to enter its standard Discovery order and I'll have to mail you one because I don't have any in here. I am also going to mail one to Mr. Humphrey and in it I'm basically going to direct the State to proceed to provide its Discovery materials by June 6. I am going to direct the Defense to file its responsive Discovery materials by June 20. Pre-trial conference then will occur on the 27th. I'll have a copy of that order to you probably Wednesday or Thursday.

I'm not aware that bond is appropriate in this case, Mr. Brown. He, in fact, is still in custody with the federal authorities, is he not?

MR. BROWN:

I think – as you described it – yes.

[28] MR. REED:

I would like to bring to your attention that a bond in my opinion is appropriate . . . a feasible bond . . . in that if I can make bond, I can be released to a half-way house, seek gainful employment. Not only would it save the State an awful lot of money by me being able to attend the trial and so forth under the flag of a free person, but it would also allow me to raise certain funds that I desparately [sic] need right now for not only this case, but in order to save my . . . what little bit I got in this land out here and should a bond be posted, I would apparently be returned to the federal penitentiary and approximately two weeks later – maybe three - I would be released to a half-way house.

COURT:

Mr. Reed, I'm not going to consider bond at this time. I am going to direct the attorney working with you to make that his first order of business in presentation of this matter to me and I would anticipate hearing from him by the end of this week as to whether, in fact, there is benefit to be gained by the establishment of posting of a bond. I've heard what you've said. They've also changed the rules on me. I was a federal law clerk in 1971 and 1972 and that was not the way it worked then. If it's the way it works now, O.K. I'm not aware that they've

changed that. I'm simply going to direct the attorney that becomes involved here that this is one of the . . . not one of the but it is the first thing to look into so appropriate arrangements can be worked out here.

[29] MR. REED:

Could you make an estimate and I realize this is just an estimate probably – what month a trial would take place should a trial date be set without anyone's asking for continuances or extensions of time?

COURT:

I would guess right now . . . I would think we're talking about August, perhaps September.

MR. REED:

Again I would like to bring to your attention . . . remember my discharged date now is in August from the federal penitentiary.

COURT:

O.K.

MR. REED:

I also have a parole for September 11 . . . I think it was or September 14, but this is a game just played because they realize that my discharge date's a month or three weeks before the parole date.

COURT:

I guess I don't understand the significance of the parole date.

MR. REED:

Well, the only significance would be if for some reason I was to lose some good days, but it wasn't serious enough to revoke my parole and some method like this would be the only. . . . for instance, maybe a minor infraction where they would feel that they could take three weeks of good days and then [30] my parole date would actually become quicker than my discharge date . . . kind of a technical little thread there.

COURT:

Anything else to discuss in this case, Mr. Brown?

MR. BROWN:

No, not that I'm aware of.

COURT:

Anything else to present at this time, Mr. Reed?

MR. REED:

No, no, sir.

COURT:

O.K. Thank you.

(THAT IS ALL THE PROCEEDINGS HELD ON THIS DAY IN THIS CAUSE.)

* * *

(Court Minutes, May 9, 1983)

* * *

Defendant in Court in person and State in Court by Richard Brown, Prosecutor for initial hearing. Defendant now advised of right to counsel and request appointed counsel for purposes of advising him as he represents himself. Defendant sworn, examined and found to be indigent. The Court now appoints Jere Humphrey of Plymouth, IN to undertake representation of defendant in such capacity as may be appropriate.

Defendant advised of all rights including nature of charge and the Court now enters preliminary plea of not guilty in his behalf. The Court now selects June 27, 1983 as omnibus date and schedules this matter for pre-trial conference for 1:30 p.m., Monday, June 27, 1983.

The Court now makes its written order for discovery by parties directing State's discovery by June 6, 1983 and defense response by June 20, 1983 by its standard order as follows: (H.I.).

Possible bond discussed. It now appearing to the Court that the defendant remains in custody of federal authorities, the Court now does not establish bond in defendant's behalf subject to review after defendant's consultation with counsel.

* * *

(Court Minutes, June 6, 1983)

* * *

Comes now State and request that discovery dates be continued for one week, both as to State and defense in view of volume of material and recent vacation schedules in the prosecutor's office. Motion granted. State's discovery date now moved to June 13, 1983. Defense discovery date now moved to July 5, 1983.

* * *

In the Fulton Circuit Court

CAUSE NO. S-82-53 & S-82-55

(Caption Omitted In Printing)

PRE-TRIAL CONFERENCE

BEFORE THE HONORABLE

DOUGLAS B. MORTON

June 27, 1983

APPEARANCES:

For the State of Indiana – Richard A. Brown

[2] COURT:

The Cause number is S-82-53 and S-82-55, State of Indiana vs. O. Scott Reed.

Mr. Reed, we will be discussing several things today, including the various motions that you filed under the title of Motion for Relief of Violations. The first one of those shows as being submitted for Cause No. S-82-55 only. The others more correctly reflect filing in both cases.

I detected a modification in the language of the motions that leads me to ask a couple of questions concerning your relationship with Attorney Humphrey. In late May there were references to . . . and your first filing in June . . . there were references to his not being available to you and not communicating with you. I then noted in filed when Mr. Brown reported that he had completed Discovery that he'd provided a certificate of service to Mr. Humphrey, but none to you. Then in your most recent filing of Motion for Relief dated June 20, you

made little or no reference to the unavailability to you of Attorney Humphrey. I then note that when we scheduled today's hearing that he is on vacation for two weeks and he's not here.

MR. REED:

Right.

COURT:

O.K. The first question I have for you – is it still your desire to represent yourself and to not have him as your attorney, but only available for counseling?

[3] MR. REED:

Yes, I believe it's essential in that first of all, I have no way of contacting the man. I don't even have his address which poses a problem.

COURT:

O.K. We can cure that simply enough.

MR. REED:

And I tried for approximately five weeks to get ahold of the gentleman and I was unable to and he did come by last week to inform me that he would be gone on vacation which doesn't really add much to my preparation for defense . . . you know.

COURT:

Has he provided you copies of the Discovery materials that Attorney Brown provided for him?

MR. REED:

No, sir, he has not provided anything whatsoever to aid in my case at all.

COURT:

You haven't seen any of the Discovery materials provided by the Sate?

MR. REED:

No, absolutely nothing. I have had nothing whatsoever to aid me in my procedure here. I've asked him for several things, but he just declined to do anything at all so far.

COURT:

I'm not exactly sure how to phrase the next question because I'm not sure you'd recognize the differences, but let's try it anyway. I indicated to him at the time of the appoint-[4]ment that as I understood you at that time, you desired to represent yourself and that his role would be an advisory role only.

MR. REED:

Basically, yes.

COURT:

His participation thus far has seemed to me to have been more in the nature of acting as counsel or acting as counsel would have instead of being available for advice. Do you think he understands that you intend to proceed as your own attorney and he simply be available to you?

MR. REED:

Well, I actually showed him the court minutes . . . I think you are aware how it's written in there . . .

COURT:

I don't recall now, but I tried to say it out loud.

MR. REED:

It says basically that I would represent myself with his assistance, you know, and I explained this very thoroughly to him and when I first seen him . . . I think it was the day after my appointment, I gave him a list of about twelve motions that I wanted him to file and some of them have to be filed in a certain sequence as the violations of the detainer act that that has to be done first because the federal courts have ruled that in order for it to be a violation it has to be filed properly – as I think you will recall – when I first came in here about how I didn't want to enter a plea until certain motions were filed?

[5] COURT:

Uh-huh.

MR. REED:

Because the courts have used this to get around certain aspects in this case in some of the court rulings and I'm trying to eliminate a technicality . . . you know, forcing the issue aside and that was one of the first things I brought up to Mr. Humphrey is that I definitely wanted him to file first of all. . . .

COURT:

He can't file them if he's not representing you.

MR. REED:

Well, I gave him a copy and asked him to enter it into the court records. . . .

COURT:

He can't. He can be available to you for advising you as to how to proceed or he can be your lawyer. If you're going to make him your lawyer, he can file the stuff, but if you're acting as your own attorney, he can't file things in your behalf. He can give you advice period.

MR. REED:

Well, so far that hasn't worked out. . . .

COURT:

O.K. All right, but I want you to understand that distinction. If you're going to get that stuff done, if you're going to represent yourself, you're going to do it yourself. I think I hear you, but it's not a for some purposes he's a lawyer and for some purposes, he's only giving me advise [sic]. It's [6] either one or the other.

MR. REED:

Well, so far it hasn't worked out either way in all honesty. I asked . . . well, actually the way it happened . . . I asked him . . . I gave him a copy of the stuff relating to the Detainer Act that was filed in federal court where I demanded my thirty day hearing. You know, I filed this both with the warden which happened to be the

representative of the U.S. Attorney General and I also filed in federal court requesting my thirty day hearing prior to transfer to the State of Indiana, as per the Detainer Act. The penitentiary stated that they were not actually aware that the State was going to come down and pick me up at this particular time because they were supposed to be notified ahead of time – not only when they were coming, but who was coming and this was supposedly to be approved in advance and this wasn't done.

So when they did come – they just showed up that day – they merely turned me over to them which happened to be a direct violation of the Detainer Act and I would like to submit – first of all, before we go any further, copies of the Detainer Act that is presently filed in the case where I demanded these rights – the first thing on the agenda because this is vitally important – the way the federal courts have been ruling on it.

COURT:

You're suggesting that you need to make a motion on the record before we go any further concerning violation of the Detainer Act?

MR. REED:

Yes, definitely. That has to be the very first thing. This is vitally important.

[7] COURT:

Do you have anything in writing that you could submit or should I . . . ?

MR. REED:

Yes, I do as a matter of fact. One of the biggest problems . . . and again I am surely not trying to inconvenience the Court and I don't want any misunderstanding that there is some kind of hostility against the Court or the Prosecutor's office because this certainly isn't true as a matter of fact. If I thought there was I'd be screaming for a change of venue and this is the last thing in all honesty that I want, but I'm working under and I think your Honor would recognize this . . . a tremendous handicap. I am pinned in this jail. I have no legal facilities. I don't have any means of making copies technically and when I would have means I would have to actually run through the law which would be a violation of the law in itself. You know, my attorney . . . uh . . . conflict and witness . . . whatever.

COURT:

Mr. Brown, he's got a copy of a motion under the Detainer Act that he wants (inaudible) to file at this time.

MR. REED:

Your Honor, if you would like I'd give this to the Court and the only other copy I have. . . .

MR. BROWN:

These are the same?

MR. REED:

Yeah, they're all identical. They are photocopies. The [8] only other copy that I do have is the copy that Mr. Humphrey has.

COURT:

Why is it important for you to file this . . . a copy of this in this case?

MR. REED:

Well, because the federal courts have ruled in several cases that if I do not file it in here and file it first and properly, then I waive all these rights. I don't have the case law other than some of it is outlined in that, but the case law is quite specific on this . . . where they're reversing the cases (inaudible) as it pertains to this violation.

COURT:

All right. Mr. Reed, is there anything further that you need to make a record of today or do you need some sort of ruling by the Court relating to this motion before you do anything else?

MR. REED:

No, I don't think there is any necessity for you to rule on that right at this time.

* * *

[16] COURT:

We need to select a trial date in this matter also. That was one of the major reasons for having a pre-trial conference scheduled. Mr. Brown, we talked about a substantial range of subjects here. I don't myself understand why a copy of a Detainer Act Motion needs to be made of record in this case. I'm going to be treating his submission of that as a motion in this case orally made with a

supplement of a copy of his submitted document. I believe most of the other things that he's indicated today except for the request for the Manning transcript and a request concerning communication with his attorney are discussed in his various filings and motions for relief.

Let's talk about the detainer request first. Do you have any comment concerning that file or any suggestion as to how to handle it?

MR. BROWN:

I would not comment. I think there would be a dispute as to the allegations made. I wouldn't comment beyond that. That would be the subject of a hearing. Is that in the nature of a Motion to Dismiss? I'm not real sure I understand really what it is we're talking about. I don't know what else it would be I guess. Is that what we're looking toward?

MR. REED:

Yes, it definitely is.

MR. BROWN:

The only comment I would have is I think – again – if you want to have a separate hearing on that, that's fine with me. [17] I think we've complied because I had to get in . . . I'd never heard of this thing before and I had to get into it frankly to get get [sic] him up here and would not do this out of the blue. I don't think even if it was determined that he was here improperly though, that it would in any way effect the dismissal of the charges, it would be no different than – as an example . . . an illegal arrest does not effect the validity of the charge . . . that is, the basis to charge. We may have to release him or

something like that. If that's what we're looking at, that may be a different issue, but perhaps it's more narrowly defined as being released back to the federal authorities . . . I don't know. It doesn't seem to me that it would be any basis even if he was correct on all points for dismissal. Possibly some transfer in detention or something. Beyond that I guess I don't have any particular comment on that issue.

* * *

[27] COURT:

Mr. Brown, have you given any thought to length of trial?

MR. BROWN:

Not specifically. There is going to be a substantial number of witnesses. I would think at least four days, possibly more than that depending on. . . .

[28] COURT:

Are you talking about the State's presentation? You say a substantial number of witnesses?

MR. BROWN:

Yes, I've listed sixteen witnesses in the Notice of Discovery, the record of Discovery and I'm sure I won't call all of those, but it [sic] gonna take probably . . . it's the type of case that involves a drawn-out bits and pieces of, you know . . . it takes a lot of people to get the whole thing together and it could take three days of trial time, I think, possibly four days to put on the State's case depending on how it goes. It's hard for me to predict. I

would think it would take three days to put the State's case on. I'd hate to say any less than that.

COURT:

Are you anticipating jury?

MR. BROWN:

I was, yes. I was operating on that assumption.

COURT:

Mr. Reed, you are anticipating a jury?

MR. REED:

Yes, sir, I definitely am.

COURT:

Well, you haven't seen what the State has yet, so discussion of possible length of the State's portion of the case would be difficult for you. You say you are expecting. . . . ?

MR. REED:

Fifteen witnesses possibly.

[29] COURT:

On average how long will each of them have to tell their tale?

MR. REED:

Well, I would imagine there will be . . . I really couldn't say . . . maybe three days. Some of them will be kinda involved. I have some of the same thing. I have to show a course of events here by myself in a certain

fashion because not only is it somewhat circumstantial . . . some of it would just be . . . uh . . . would just be an average person's intelligence to access the overall judgment on a testimony. You know, it just couldn't be cut too short because you couldn't really evaluate the whole picture from just a few yes or no questions. There is a lot of conspiracy involved here and I will have to bring all of this conspiracy to light, too, in one way or another. It's kinda important.

COURT:

All right, the entry for today will reflect first of all that we met and discussed these matters in pre-trial conference and that your motion concerning the Detainer Act was filed and taken under advisement. The Motion for Relief of Violations remains under advisement as to issues of witness and out-of-state witness preparation, availability of legal materials and I anticipate . . . frankly, what I'm going to do is sit down and read as much law as I can find on the entire issue – when the defendant can represent himself and what the State needs to provide under those circumstances.

[30] COURT:

It occurs to me that Mr. Brown's arguing that the Court's initial ruling and appointment of Mr. Humphrey was incorrect and . . . at least under the circumstances that he was appointed. and that frankly is a possibility. It could be that that was all phrased . . . at least phrased wrong because . . . well, not because anything . . . I'm just going to go back and put down a statement and I hope to have this by the end of the week – as to what his responsibilities entail and then direct comments as to how we

will proceed with such things as witness availability to you, et cetera.

In any event, the entry for today will reflect that that all remains under advisement. I am going to note that Discovery materials provided to Attorney Humphrey have not been made available to the Defendant individually and that the State is by the conclusion of Wednesday of this week to have provided a copy of those Discovery materials to the Defendant individually at the jail. That will require that by July 18. The Defendant will have filed his Discover response outlining – did you ever get a copy of that Discovery motion?

MR. REED:

Yes, I did.

COURT:

O.K. . . . outlining the things that you're to respond with.

MR. REED:

Yes, sir.

[31] COURT:

So your filing date will be by then. I'm going to tentatively select September 13 as trial date and I anticipate six days at least for trial. I may very well hold two weeks. I recognize that we've been dealing with an August release date for you, Mr. Scott. The calendar is in such a condition that I do not have that kind of time available until the second week of September and then I've two weeks together that I can devote as much as is required for this.

The trial is presently anticipated to be to a jury. Any proposed jury instructions – preliminary or final – should be made available not later than September 9. For what it's worth, Mr. Reed, I am aware of the limited nature of the law books that are available to you. I am also aware, however, that the entire criminal code is available to you It's (blank space) 35 – the green books that they have over there. There's no recitation of case law in them, but you do have available at the sheriff's department the statutes of the State.

MR. REED:

Your Honor?

COURT:

Hold the thought a moment. Finally – I'm going to also direct, Mr. Reed, that you file by July 18 any other preliminary motions that you may have – specifically including any request that you would have for documentary materials, such as the Manning transcript. Let's use that as an example. I was the presiding judge at the trial. If you're going to make [32] a request for a document such as that, you'll need to make references as to why it's necessary. If you believe there is evidence, for instance, in the transcript that would tend to show your innocence, some reference to the kind of evidence that you are looking to there will need to be made. That wasn't obvious to me on its face, and just because you'd like to have one isn't enough. You know that.

MR. REED:

No, sir, I know that.

COURT:

You know that.

MR. REED:

I'll be glad to give that to you.

COURT:

But you'll need to with some specificity indicate why you need those things. O.K. I think I'm done.

MR. BROWN:

I'm sorry, your Honor, did you indicate a deadline for pre-trial motions?

MR. REED:

No, not yet.

COURT:

To him.

MR. BROWN:

Yeah.

COURT:

Why, do you have . . . I'm sorry I hadn't anticipated any pre-trial motions from you?

[33] MR. BROWN:

No, was there a date? I missed the date.

MR. REED:

July 18.

COURT:

July 18 – the same day he is to respond to Discovery.

MR. REED:

I can keep track of that. Everything happens on my birthday. I was sentenced on my birthday as a matter of fact – the last time! Just ain't my day I think. A couple of things I'd like to bring up – one: September 13 as a trial date . . . now if everything should go wrong on my releasing . . . I would like to bring to your attention that my parole date is September 14 which is the very next day which could complicate several things involving the federal authorities . . . if – for some reason – they should decide to withhold by good days because I'm here in jail. They do some strange things in a Federal records office and the only way you can get it offset, you have to take it to Federal court and fight it for six months, but my parole date is the 14th . Of course, I should be released some two weeks before that on mandatory release date. They do some strange things though.

COURT:

O.K.

MR. REED:

Another think I would like to ask – on that Manning transcript, could I make that orally or would you prefer it in writing?

[34] COURT:

I want it in writing.

MR. REED:

O.K. I can do that.

COURT:

I read better than I listen.

* * *

(Court Minutes, June 27, 1983)

* * *

The Court now notes that it has received hand written motions from the defendant dated May 4, 1983, May 23, 1983, June 8, 1983 and June 20, 1983, the first of which is entitled Petition for Writ of Habeas Corpus and Dismissal of Charges and the last three of which are entitled Motion for Relief of Violation. The Court now denies Petition for Writ of Habeas Corpus and Dismissal Charges.

Pre-trial conference held and nature of cause discussed. Defendant now submits oral motion for dismissal for violation of Federal Detainer Act and submits in writing copies of motions submitted in Federal Case TH 83-69-C in the Southern District of Indiana. Motion taken under advisement.

Arguments heard upon motion for relief violations and motion taken under advisement for court determination of appropriate method for proceeding. The Court is now informed that the State produced discovery but made such discovery available entirely to attorney Jere Humphrey and that none of such discovery available entirely to attorney Jere Humphrey and that none of such materials were forwarded to O. Scott Reed. The Court now directs the delivery of all such materials to O. Scott Reed. The court now directs the delivery of all such materials to O. Scott Reed by Wednesday, June 29, 1983. The court further directs that the defendant responde [sic] to discovery by Monday, July 18, 1983. The Court further directs that any other preliminary motions be submitted by that time.

Cause now set for six day trial by jury to commence at 9:30 a.m. Tuesday, September 13, 1983. The Court directs that all proposed preliminary and final instructions be submitted not later than Friday, September 9, 1983.

* * *

MOTION FOR RELIEF OF VIOLATIONS

[Dated] June 20, 1983
[Filed 6/27/83]
(Caption Omitted In Printing)

Comes now, O. Scott Reed, and files for the *fourth time* (see motions filed 5-4-83, 5-23-83, 6-8-83) a motion for relief of violations imposed on petitioners right to a proper defense, Equal Rights protection, contact with witnesses, contact with attorney, access to legal facilities, allowing office of prosecutor to disregard Court orders (see "Discovery Order" amendmented [sic] 6-6-83), illegal jail restraints (see 326 F. Supp. 1735 – and other above motions) and many other violations completely violating petitioners right to pretrial motions, and a fair trail [sic], proper conference with witnesses etc.

Petitioner requests a prompt hearing before this Court to prove these allegations, request oral argument, relief of violations, and enter these motions, and requests, into the court record.

VIOLATIONS

* * *

2. That illegal confinement at the county jail has restricted petitioner from contact with court witnesses, appointed attorney, restricted pretrial motions, proper defense preparations, confidential attorney-witness visiting, proper phone access, etc. in violation of U.S. vs. Reed, 658 F.2d 630-631 (caselaw), 326 F. Supp. 1375 (pretrial) and decisions listed in prior motions.

* * *

5. That petitioner be permitted to file for dismissal on violations of Agreement of Detainers Act, as shown in motion filed 5-4-83, where petitioner was illegally transferred to the State of Indiana and is being held in violation of Agreement of Detainers Act, without requested hearings, and without legal recourse.

6. That petitioner was held for 12 days without hearing before the court, and then only after having filed Motion for Habeas Corpus (see 5-4-83). That petitioner requests this being read into the court record.

7. That petitioner is eligible for release to Community Treatment Center from Federal Authorities and therefore Writ of Habeas Corpus is proper and should have been heard and petitioner released on bond. This is also a Equal Rights Violation and requires a prompt hearing before this Court.

8. That petitioner requests dismissal of charges and prompt return to Federal Authorities for release as outlined in Agreement on Detainers Act. (See motion 5-4-83 for details.)

9. That petitioner requests legal facilities be made available as he is his own attorney and restriction of legal facilities is violation of law, and equal rights, and confinement laws. (See motions 5-4-83 – 5-23-83 – 6-8-83.)

10. That the court, by refusing to correct violations, is causing delays in trial dates, as petitioner is unable to prepare for trial, further causing illegal confinement, without allowing bond, in violation of the above laws, and violation of equal rights, to call witnesses, and prepare my defense. My confinement is not cause for the

above violations, except for security only, and these violations in no way involve security. (See paragraph #2, above for case law.)

* * *

Respectfully submitted,

/s/ O. Scott Reed

Clerk of the Court will please submit proper copies of this motion to all parties involved as I have no legal facilities or means of proper motions.

* * *

MOTION FOR RELIEF OF VIOLATIONS

[Dated] June 29, 1983
[Filed 6/29/83]
(Caption Omitted In Printing)

Comes now, O. Scott Reed, and requests relief of the following violations.

1. Petitioner is a Federal prisoner, under temporary state custody, and remains under control of the Federal Government at all times except for prosecution. Detainer Act – Article 5(D).

2. That the State of Indiana must, by signed agreement, be responsible for the: "caring for" and "shall also pay all costs" (Detainer Act – Article 5(H)) of the temporary custody of petitioner as per Federal Law and policy of the U.S. Attorney or his agents.

3. That petitioner is under constent [sic] Doctors care because of high blood presure [sic], (taken to local hospital once so far) and requests constant Doctor visitation and medical care, Dental care, and such care for as "hair cuts" and hygiene supplies as set forth by the U.S. Attorney or/and his agents, and agreed to by the State of Indiana (Detainer Act - Article 5(H)).

4. That petitioner requests the above listed "care" to be furnished, cost prepaid, by the State of Indiana, or County of Fulton, as per agreement, and that the court order such hygiene as hair cuts, given on a regular basis as per Federal policy, and such violations to cease, and regular doctor care as outlined in Federal law and policy, and all other relief in violation of law, and equal rights protection, violations of confinement (see prior motions)

and phone restrictions removed, as per Federal policy, and equal rights protection.

Respectfully submitted,

/s/ O. Scott Reed

The Clerk will please submit copies to all proper parties as I have no means of copies, or legal facilities available.

Thank you.

* * *

PETITION FOR RELIEF OF VIOLATIONS OF STATE LAW, LOCAL CONFINEMENT, FEDERAL LAW, AND MOTION TO DISMISS ALL CHARGES

[Dated] July 7, 1983
[Filed 7/8/83]
(Caption Omitted In Printing)

Comes now, O. Scott Reed, representing himself as counsel for defense, and requests relief for the *Fifth Time*, relief of the following violations. (See motions and minutes of the court: 5-4-83, 5-23-83, 6-8-83, 6-20-83, 6-28-83, 6-29-83).

1. That petitioner is confined in the County Jail, under above cause, and is being held in violation of Indiana State law, Federal law, United States Supreme Court Caselaw, and United States Court of Appeals case law. (See motions filed above paragraph.)

2. That petitioner has been confined for about 2½ months (since April 27, 1983) under the above violations, with the above motions for relief having been filed in above court, and without any relief of said violations, in any form, or by help of any counsel.

3. That on June 27, 1983, a pre-trial conference was held before this Court whereas the above motions, violations of law were discussed, and discovery and trial date was set, and as of this time there has been no relief of violations.

4. The violations still remain as follows:

A. Violations of Agreement on Detainers Act.

* * *

D. Violations of Equal Rights Protection: and law.

1. Equal rights to defense – no talking with witnesses.

2. Equal rights with prosecutor – legal facilities, phone calls restricted, availability of investigation, and law books, means to call witnesses, at reasonable hours without "mandatory collect calls" restriction.

3. Relief of one (1) collect call per week restriction.

4. Relief of 15 minute weekly visit. (All persons must visit together under word by word censorship.

E. Refusal to provide means of talking to witnesses.

* * *

H. Restrictions of visiting with witnesses during reasonable weekly hours.

* * *

L. Confinement is in violation of law: 326 F. 1375, and petitioner requests all restrictions not subject to security be removed.

M. That petitioner requests dismissal of charges due to irrepairable [sic] damage created by these violations.

N. That petitioner requests appearance before the court for arguments & entrance into the record.

Respectfully submitted,

/s/ O. Scott Reed

The Clerk will please submit copies to all parties as petitioner has no facilities to do so.

Thank you.

* * *

In the Fulton Circuit Court

CAUSE NUMBER: S-82-53 and S-82-55

(Caption Omitted In Printing)

ORDER

The above entitled cause is before the Court upon the various proceedings held herein to determine appropriate procedures for defendant's *pro se* representation including his five motions for "Relief from Violations" and the oral presentation made in Court at pre-trial conference herein on June 27, 1983. Now the Court hereby makes the following rulings:

1. That upon defendant's motion for dismissal or "relief from violations" pursuant to the Detainer's Act, the Court does now deny the said motions; defendant has failed to provide any showing of the terms of the Act relied upon or the particular acts of the State to which he objects. There appearing on its face no violation of such Act, the Court does now rule accordingly.

2. The Court has previously determined that defendant has sought to proceed *pro se*. The Court has appointed attorney Jere Humphrey in this cause to assist the defendant and the Court does now determine that such appointment should be on the basis that attorney Humphrey is "stand by" counsel for defendant. For so long as the defendant seeks to proceed *pro se* or until further order of Court, the duties of attorney Humphrey will be limited to:

(a) the aiding of the defendant to provide legal materials or alternative sources of legal knowledge for his benefit,

(b) to assure that he has access to sufficient writing materials that he may file necessary motions and other pleadings, and

(c) he shall be available to participate in this cause should the determination for self representation be terminated.

3. The majority of defendant's complaints in his various motions for "relief from violations" relate to what he perceives to be in appropriate limitations upon his ability to prepare his defense because he is a pre-trial detainee in the Fulton County jail. It has been stated in *People v. Rice*, (1978) 579 P 2nd 647, Cert denied 99 S. Ct. 261 as follows:

> It is reasonably clear that defendant's right to defend himself encompasses access to law librarys [sic] or alternative sources of legal knowledge. However, as a pre-trial detainee, the defendant cannot realistically expect to have all of his desires relative to the preparation of his case satisfied upon demand. Nor is it the trial courts duty to remove all of the obstacles from the path of the defendant who has elected to represent himself. . . . After the defendant chose to represent himself, he had standby counsel available . . . he was at no time deprived of the access of a law library or alternative source of legal knowledge since he had the functional equivalent of a law library in the form of standby counsel and there is no violation of defendant's constitutional right to defend himself.

In *Wells v. State*, (1978) 358 So 2nd 1113, the Court held that when a defendant rejected a public defender's services, he was not entitled to access to law books.

There is no reason to believe that this defendant should be treated differently at the jail than any other defendant. He may elect to conduct his own defense if he wishes but he will do so within the limitations of the jail rules in which he is well versed. Should he elect to not proceed in that fashion, then the court will grant his request for appointment of counsel.

4. The Court does now determine the following specific course of procedure in this case:

(a) the Court believes defendant to have reasonable access to legal knowledge through its appointment of standby counsel; however, the Court will provide in addition, (i) that the jail staff should provide defendant access to one of the jail's statute books, the book to be selected by defendant and (ii) access to two volumes from the Fulton County Law Library per court day, each day's volumes to be returned before further volumes are provided. Naturally upon the defacement or damage of any law books, thus provided, the Court will immediately cease providing such books to the said defendant;

(b) witness interviews may be conducted by defendant by properly scheduled deposition;

(c) the Court is aware of no reason for extension of additional telephone privileges to the defendant other than those normally provided to inmates; he remains free to contact his standby attorney as necessary;

5. The Court has previously described for the defendant the dangers inherent to him of seeking to proceed *pro se* in a case, illegible being specifically:

(a) that he will be held to the same standards as any trained legal counsel

(b) that he will be required to comply with all relevant rules of conduct in the Court room and in the legal proceeding

(c) that the Court has no duty to inform him of any rules either procedural or substantive pertaining to his case particularly including steps precedent to presentation of certain defenses, steps necessary to preserve issues of appellate review or any other procedural or substantive rules; the Court's duties are limited to the explanation to the defendant of the appropriate constitutional rights of all defendants.

6. It has become apparent to the Court through pre-trial proceedings this far held, that the defendant will be incapable of presenting the kind of defense which he has contemplated to date, because of his incarceration. The Court urges and strongly recommends for the defendant's benefit that he withdraw his request to proceed *pro se* and that he instead determine to proceed with the assistance of counsel. The Court however, at present, believes defendant to be competent to elect to proceed *pro se*, and the Court will not make that determination for him.

7. This cause now set for further pre-trial proceedings for 2:30 p.m., Monday, July 25, 1983 at which time any pending motions will be considered, status of case

will be reviewed and the Court will inquire in depth of the defendant of his present determination to proceed *pro se*.

DATED this 15th day of July, 1983.

/s/ Douglas B. Morton
Douglas B. Morton, Judge
Fulton Circuit Court

* * *

PETITION FOR RELIEF OF VIOLATIONS

[Dated] July 26, 1983
[Filed 7/25/83]
(Caption Omitted In Printing)

Comes now, O. Scott Reed, representing himself as counsel for defense, and requests relief for the *Sixth* (6) time, of violations filed before this court. (See motions and minutes of Court: 5-4-83, 5-23-83, 6-8-83, 6-20-83, 6-28-83, 6-29-83, 7-7-83, 7-18-83.)

1. That petitioner is confined in the County Jail, under above cause, and suffering from all of the above violations listed, as complained of for approximately *three* (3) months without any relief.

2. That petitioner lists violations seeking relief of illegal confinement, restraint of defense preparation, restraint from legal facilities and law books, restraint from witness contact, violations of Equal Rights protection, noncompliance of requested witness subpoenas, and all other listed petitions for relief of violations.

* * *

4. That petitioner requests trial be held within the legal guidelines of the Agreement on Detainer Act, signed by the State of Indiana, and by which the State of Indiana is in violation, (see first motion filed before court) and is forcing petitioner to be tried beyond the limits as set forth in the Agreement on Detainer Act. Petitioner has filed (oral motion and documentation before court) request for dismissal of charges, which is pending, and requests no extension of time be granted beyond those guidelines. The 3 month delay rests solely

in the court and irrepairable [sic] damage has resulted, and the charges should be dismissed for the above reasons and violations.

5. That petitioner has been appointed counsel to assist in defense preparation, However, counsel is unable to aid in defense for the following reasons: That in the pre-trial hearing before the court (counsel not present) petitioner requested motions to be filed for relief of violations. The court ruled against this oral motion. (See court pretrial hearing transcript.) Further, the court has failed to issue requested subpoenas for witness interview. (See motions above listed.) The court has failed to allow phone conversations between (without collect one call per week) petitioner and counsel. (See above motions for relief of violations.) Also: The pre-cost factor discussed at the pre-trial hearing has yet to be resolved. Petitioner is restricted from counsel assitance [sic] in bringing witnesses by restriction of funds. (See pre-trial transcript for oral motions for funds – and motions of equal Rights violations – prosecutor has available funds for investigation plus unlimited legal assistance, e.i., [sic] F.B.I., State Police, County Police, etc.) Petitioner has be [sic] denied all of these facilities and has been denied all requested alternatives.

* * *

7. Petitioner once again requests proper *care* in County Jail, as per Agreement on Detainer Act. (See prior motions filed.) The care provides for health, hygiene care, proper resting facilities, exercise, hair cuts. The above violations have caused illness, illegal confinement and force petitioner to be presented in "seedy" "bum-like"

appearance before general public and in court appearances. Petitioner once again requests proper hygiene care, e.i. [sic] hair cuts, pillows, sheets, exercise, etc., which is both violation of law (326 F. Supp. 1375 – motion filed 6-20-83) and equal rights protection, and violation of Agreement on Detainer Act.

8. That improper Jail restrictions do, and have prevented petitioner from filing and researching proper motions for other pending legal process; e.i. [sic] U.S. Tax Case, illegal liens placed on property, filing proper appeal on property forclosure [sic], that confinement has caused land forclosure [sic] directly, and prevented, directly, sale of property to buyers. That such restrictions, and violations, has, in fact, remained in force until property has been disposed of, and recourse to recover losses placed beyond available time limits by law – including recovery of stolen property. Petitioner seeks relief from these violations, and Court order directing the time limits extended in which to file for recovery of these violations.

* * *

Respectfully submitted,

/s/ O. Scott Reed

mailed 7-25-83

Clerk of the Court,

Will you please prepare copies of this motion and deliver them by mail to all persons involved in case, as per court instructions, as I have absolutely no legal facilities or means to copy or transmit legal copies.

Copy to: Jere Humphrey, Plymouth, Indiana counsel.

* * *

IN THE FULTON CIRCUIT COURT

CAUSE NO. S-82-53 & S-82-55

(Caption Omitted In Printing)

PRE-TRIAL CONFERENCE

BEFORE THE HONORABLE
DOUGLAS B. MORTON
August 1, 1983

APPEARANCES:

For the State of Indiana - Richard A. Brown

[2] COURT:

These are Cause No. S-82-53 and S-82-55, State of Indiana vs. O. Scott Reed. The last time we were in court I indicated to Mr. Reed that we would be continuing this matter until 9:00 Friday morning which would have been the 29th day of July and as a matter of fact, we had a jury out until 2:10 or something like that that morning and the Court did not convene that day until 1:00 p.m. and we did not get a chance to meet with Mr. Reed that day. This being the next court day we just set it over until now. And nobody told you that I suspect, so that's what occurred and that's why we're a day late.

While we were in court rather than address the issues raised upon the Petition for Relief of Violations, the Court instead determined that Mr. Reed had not yet received a copy of its ruling dated July 15 relating to pro se representation. That was provided and we simply continued the matter up to today.

Mr. Reed, since our last time in court I gather you have now had an opportunity to read through that order?

MR. REED:

Yes, sir, I have, your Honor.

COURT:

Probably more than once.

MR. REED:

Yes. Several times.

COURT:

I think it clear at least to me that it is substantially [3] at odds with what you had anticipated to be your ability to represent yourself and the steps you would be in a position to take should you represent yourself. I gleen [sic] that essentially from the language that I outlined in Paragraph 4 as to the steps you will be entitled to take while at the jail in preparing your own representation and frankly and more dramatically from your comments while we've been in the courtroom concerning the things you would like to do and the tenor of your various handwritten petitions and motions outlining the steps you would like to take.

The thing I need to determine from you, Mr. Reed, is whether, in fact, in view of what I propose . . . the methods that I propose to proceed upon and what, quite frankly, will be limitations upon how you had intended to proceed . . . whether or not you intend to continue to represent yourself or whether you would instead desire to change your request to become a request for court appointed counsel. That is what I am going to need to determine today.

MR. REED:

Yes, I did look it over several times and I thought it over and I still feel that I cannot possibly let another attorney defend me without just being hopelessly overwhelmed in the court, I guess. There are just so many items of evidence that a lawyer would not be able to get in this case because the case is a special case. We're dealing with almost entirely criminals. I think the Court from experience would be aware of the fact that generally this type of person will not confide in anyone unless it would be a direct plea from [4] one of the defendants and much less an attorney. That would be one of my major problems.

Another one is that due to the complications involved in this thing that I would be the only one that actually knows the intricacy involved and the questions that have to be asked to bring the evidence out. I honestly believe this. I am certainly not trying to be hostile to the Court.

COURT:

Mr. Reed, I believe you have a right to represent yourself. I want you to know that you are embarking on a course of action which in my opinion – which I am not inclined to thrust upon you . . .

MR. REED:

I know it.

COURT:

. . . is not in your best interest. Every case is a special case. The fact patterns of all cases are very peculiar to the

specific charge and the specific elements that come up to make a criminal case. Criminal attorneys and Mr. Humphrey who would be the attorney that would be involved for you – is an extremely well-experienced attorney in criminal law. He's been public defender for Marshall County for close, I think, to a decade. He's been involved in other criminal cases, has done work including appellate work all the way to the United States Supreme Court. He has practiced not only in this court and the Marshall County courts and other surrounding courts, he's also taken various steps of pursuing State criminal matters into the Federal District Courts and [5] 7th Circuit Court of Appeals. I am familiar with these things that he has done. I suspect that these are things that are beyond your ability to do.

In addition, I would suggest to you that he is much more familiar with the workings of the decision making process whether it be tried to a court or a jury and he, better than you, can suggest to you the potential impact of types of evidence or specific testimony and as to its desirability for follow-up. He is a man trained in the law and he – simply having the experience of having done this including the specific intricacies of any case . . . I think would have a great deal more experience than any individual possibly could in dealing with the case. You are aware of that?

MR. REED:

Yes, I certainly am. That's the only reason I even hesitate.

COURT:

Frankly, I think the thing that you could not possibly do for yourself is to know how to preserve an appellate record in case you wish to do so because of any erroneous rulings of the Court anywhere through this proceeding. That has been somewhat true of the things we have faced thus far and will most certainly be true of anything that were to occur in trial . . . much more so than any of the procedural steps that we're undertaking now. You're going to get left in left field if, in fact, you lose the case and there are then Appellate issues, you're going to be waiving those all over the place and by waiving, I mean giving up.

[6] MR. REED:

Yes, sir.

COURT:

You are aware of that?

MR. REED:

Yes.

COURT:

In proceeding upon any case in the courtroom, I cannot first of all give you legal advice and I cannot show you any favoritism as against the Prosecutor because you are being unrepresented. The Court is not in a position to look out for one party or the other. The Court is only in the position to treat both fairly. That being the case you'll be held to the same standards and presentation and procedure as will the trained individual who is presenting the case against you. Do you understand that?

MR. REED:

Yes, I do.

COURT:

You can be required and you will be required to handle yourself with the same decorum and the same methods to present things in such a fashion as to not cause disruption of the standard legal process and otherwise to act as if you were trained in the law even though you are not. Do you understand that?

MR. REED:

Yes, I do.

[7] COURT:

I can think of examples where, for instance, you could get up during final argument having chose to not testify and begin talking about things that are within your knowledge but are not a part of the evidentiary record. Do you understand that if that were to come to pass I could hold you in contempt of Court and impose criminal sanctions from that, declare a mistrial and you'd be punished because of what you were trying to do in representing yourself and not because the case had even been completed?

MR. REED:

Yes.

COURT:

All of those things work against you most harshly, do you understand that?

MR. REED:

Yes.

COURT:

And knowing all of these things, is it still your desire to represent yourself?

MR. REED:

Yes, sir, I believe it's the only chance I have in all honesty. I appreciate . . . I honestly appreciate that . . . the old saying about only a fool represents himself or something of this nature, I think it is.

COURT:

It has to do with people being able to take out their own appendix if they wish. They can be their own doctor and [8] they can represent themselves in a court of law.

MR. REED:

I honestly . . . I would like in a way to be able to cooperate but seeing as this isn't possible – with an attorney.

COURT:

You haven't done . . . oh . . . you haven't done anything that shows a failure to cooperate with the Court. I haven't had any problems with you.

MR. REED:

And you will not.

COURT:

. . . if that's what you're suggesting by your comment. As I heard it I don't think it was. I want you to know that I think you're undertaking the wrong course of action. This is a matter that's not appropriate for me at this time to intervene. However, should it appear that you are involved in taking steps or presenting a defense that's clearly beyond your abilities, it is possible for the Court even during trial to set aside your request to represent yourself and to direct court appointed counsel to continue in your behalf. I can take that decision away from you at some later time if it appears to me that the workings of justice so require. Do you understand that?

MR. REED:

Yes, I do. I can appreciate it.

[9] * * *

[COURT:] All right, then we'll show this having been determined, Mr. Reed, that at the present time you are still seeking to represent yourself with Mr. Humphrey only on a stand-by status.

The July 15 order at Paragraph I does address itself to your previous request concerning the Detainer Act. Frankly, I never entirely understood your motion in that regard, except that you've indicated that for a variety of reasons you felt it necessary to make a record concerning the Detainer Act and I have not seen anything which appeared to me to be a violation of it and accordingly I denied your motion without being specific as to why because I frankly never understood what you were asking. I guess we shoud [sic] address that first.

You, Mr. Reed, are apparently acting under the belief that a request concerning violation of Detainer Act is necessary here for your protection and as I understand it, it's for your protection in an essentially unrelated case that's going on in the Southern District of Indiana, is that correct?

[10] MR. REED:

Several cases as a matter of fact, including one in the U.S. Court of Appeals.

COURT:

All right. Is there any further record that you are aware of that needs to be made at this time as it relates to that?

MR. REED:

Yes, sir, your Honor. I sent a petition for a revision of pre-trial procedure over to you this morning.

COURT:

I haven't got it. Do you know if it was delivered, Earl?

EARL VANCE:

I have not seen it.

MR. REED:

Paul was supposed to . . . the jailer was supposed to have hand delivered it this morning.

[11] * * *

(RECESS)

(RESUME)

COURT:

The Court obtained a copy of a multiple page document which has been file stamped August 1 – today – and is now part of the record of this case and is a motion of a variety of topics filed by Mr. Reed.

Mr. Reed, I was making inquiry concerning the Detainer Act.

MR. REED:

Yes, sir.

COURT:

Further comment if you would please?

MR. REED:

On the oral motion and the copy of the case that I had filed with the Federal Court, I listed that according to the Detainer Act in the case law that in order for the State to file a detainer and extradite petitioner from the Federal government which by the Detainer Act is a state – that should the petitioner file the petition for hearing prior to removal by the Detainer Act to the State, that the State must grant [12] this hearing. I did file this. It is in the Court records where I filed this with the State, with a petition for appointment of counsel and for legal action in the Court – both State and Federal and that both the State and the Federal did deny this pre-transfer hearing and did, in fact, transport me without this requested hearing. The State agreed to this hearing on one of these pages

contained in the paperwork that I gave to the Court from the Federal court to grant this . . . grant an attorney where it was signed by me and Mr. Gordon or something which is the administrator systems manager and he wrote to Mr. Brown concerning this. The hearing was never granted. The petitioner filed both with the warden and received a denial, with the United States Attorney and in the Federal Court. The Federal Court ruled that it had to be filed in the state, but the actual ruling in the Federal Court was more to ascertain that it was properly filed and that it is recorded in the Federal Courts that I did file it. According to the Detainer Act without this pre-transfer hearing, I should be dismissed from the charges.

Now I do not have and I have not been made available to any law or law books or anything else as of this date. I might mention that the court order signed by the Court on July 15 and that it was lost or misplaced because this hearing has still never been sent to the jail and they are not aware of this. I talked to the sheriff and two or three deputies – one being the jailer . . . head jailer- . . . whatever Paul is over there and he is not aware of this either. Therefore [13] without this hearing they can grant me nothing, so I would like to bring it to the attention of the Court orally and until I can come up with the case law . . . actual Indiana State case law and appeals State law that actually determines this . . . that either the judgment's either be withheld or dismissed on that charge.

There are more laws pertaining to the Detainer Act that I would like to bring up, but that is the initial

dismissal that I wanted to be sure was filed before anything else before the Court. We talked about that at some length at the initial hearing.

COURT:

Mr. Reed, the Bureau of Prisons and the materials that you submitted to me says, "In response to your above request to Warden Keohane regarding a pre-transfer hearing where you were released under the interstate agreement on Detainer Act to the State of Indiana. Please see the attached memos from Mr. Cripe, your prison legal counsel." And one memo from Mr. Westbrooks, Regional Administrative Assistant Manager. It was the Bureau of Prison's position that inmates in Federal custody are not entitled to a pre-transfer hearing it is referenced by Cuyler v. Adams and that is signed by Gordon D. Pleus, Administrative Assistant Manager.

The memorandum that is referred to is apparently not attached to what you've submitted to me since the next document is your Petition for Appointment of Counsel.

MR. REED:

Your Honor, as a matter of fact, the person, this Mr. [14] Pleus, is in error here and in the Cuyler v. Adams which it states in here – the prisoner's transferred pursuant to interstate agreement are entitled to preexisting rights to challenge their transfer, including hearings in state adapting uniform criminal extradition acts which this state is a party to, did sign the agreement and to add to this, the Court of Appeals said in order for it to be binding in all cases that one must bring up the Equal

Rights Violations whereas we have an Equal Rights Violation – whether it's State, Federal or whatever – for this pre-trial hearing. And so far the rulings have been basically as I understand it – even if there was doubt without the Equal Rights hearing that there surely was no doubt with the Equal Rights hearing.

I did – as you will note through here – specifically brought that into the petition that not only was it a detainer violation as agreed to by the State of Indiana, it is also an Equal Rights violation as declared by the Federal courts.

COURT:

And so what is your suggested remedy again?

MR. REED:

I ask for a dismissal in that the State did violate the detainer transfer and that I did file all of the legal procedure pertaining to a request for a pre-trial hearing. As you will note in here I have filed over and over – I have filed . . . I even signed on the back of the detainer agreement relating to appointment of counsel on the hearing. I also filed a request for an attorney to fight the action in a pretrial hearing which was not acted upon or – as far as I know – [15] was just not acted upon.

COURT:

What was the result of Cause No. TH-83-69-C, the proceeding filed in Federal Court?

MR. REED:

There is a copy of the motion filed by me to the State also in this.

COURT:

Yes, I know. What was the outcome of the motion?

MR. REED:

Nothing as far as the State was concerned. They just ignored it. The Courts just did not rule on it at all. The Federal Court ruled that although the action seemed to be appropriate that it had to be filed in the State first which is how it's generally . . . that's how it's been run through the Courts. The Federal courts don't want to act upon it or take jurisdiction until the State had denied it and this is how the Federal court rules on it which was just recently.

COURT:

Any record to make on this issue, Mr. Brown?

MR. BROWN:

It's my recollection that it's correct that the Court has this. . . . you filed these things with the Court, did you not?

MR. REED:

Yes. Yes. They are filed with the Clerk.

MR. BROWN:

Your Honor, if you assume for the moment that we have [16] violated the Interstate agreement on Detainers and Mr. Reed is somehow wrongfully in our custody, that would still not be a basis to dismiss the charges. Even an illegal arrest in an ordinary sense does not invalidate the charge. I don't think dismissal would be appropriate. I

don't think there has been anything shown either in the motions filed or the documents filed here that indicate there has been any violation. Quite frankly this was all new to me. I'd never heard of Interstate (inaudible) Detainer and we made every effort to comply with it through the help of the State Administrator and the prison. As far as I know from reading it and the documents that Mr. Reed has filed, I think they show on the face that we complied. Assuming they didn't, I don't think he'd still have the right to dismissal and that's the request here.

COURT:

I don't see where there has been a violation of any State rights that have been presented nor any Federal rights. If you choose to pursue this cause in the Federal court that is certainly appropriate for you to do, but I am not inclined to review the Federal Bureau of Prisons' determination as to its procedure where the documentation has been submitted to me is satisfactory on its face as to your being presented to this jurisdiction for the facing of these charges. If you have a procedural problem that you feel you can remedy by Federal law, that's up to you, of course. The Court will continue to deny the request that you have relating to any Detainer Act violations by which the remedy is as you've suggested dismissal.

[21] * * *

[COURT:]

Did you have anything else to raise today, Mr. Reed?

MR. REED:

Yes, sir, I do. I would like to bring up before I forget it or it slips my mind – I would request the Court to have the jail to provide hair cuts as a for instance for petitioner. I believe that comes under the wording of 'care' and taken care of, listed in the Detainer Act whereas the State agees [sic] to provide this and that as a Federal prisoner, the U.S. Attorney General guarantees this specifically in the policies of the Federal detainees and prisoners both, and other such hygiene acts as listed on this latest petition.

COURT:

Have you had the availability of a hair cut since you have been here?

MR. REED:

No, I have not. They do not provide hair cuts.

COURT:

I will take the request under advisement. Anything else to address?

[26] * * *

MR. REED:

O.K. Yes, sir. I'm sorry. I honestly apologize because I know this is going to take up extra time, but if you will note, I have asked for over three months now for access to a law book on procedure. This has also been denied by everyone so far, including the Court order whereas these be made available has also been denied. And, of course,

as I said, the jail has not been made available with a copy of the Court order yet.

COURT:

I'll have one to them yet today.

* * *

[29] [COURT:]

Anything else?

MR. REED:

Yes, sir. I think the Court is knowledgeable in that when I was brought here from the Federal penitentiary that I had a release date very nearly the end of August or a parole date no later than September 14. I filed a motion for a bond on this. I think we discussed this in court ant the Court [30] withheld judgment or the setting of a bond on this. I would like to bring to the Court's attention that Mrs. McLochlin did, in fact, talk to the people in the Federal penitentiary release department and they told her – and I am waiting for confirmation of this – that my release date, mandatory release date, is approximately August 31. Approximately. I would like to ask the Court to again make a reasonable bond on this and possibly even recognizance which would prevent untold hardships on petitioner for a bond setting so this could be arranged in advance somewhat because as we near this trial date, I think everyone is going to be under much confusion and whatever. If this could be taken care of in advance and a bond set and my possible release that this would surely benefit me. I believe it would the Court also.

COURT:

Are you prepared to proceed with the bond recommendation today, Mr. Brown?

MR. BROWN:

Yes, your Honor.

COURT:

What is your recommendation concerning bond?

MR. BROWN:

Given the fact that the felony provisions which I guess I could something if nothing else. Given the fact that we do have an habitual offender count alleged in this case to the count of theft so that you have a potential of over thirty years in prison as possible penalty, given the nature of the seriousness of the offense to me it sort [31] of equates to something between a Class A and Class B felony if you want to think of it that way. I think there should be a very substantial bond given the seriousness of it and the lack of real connection with this community . . . somewhere in the neighborhood of . . . as I recollect the Court's regular schedule is $50,000.00 for an A felony and $25,000.00 for a B felony. That's what I thought and based on that I would recommend something in the neighborhood of $35,000.00 to $40,000.00 bond.

COURT:

What is your recommendation for bond, Mr. Reed?

MR. REED:

Your Honor, I would like to bring to the Court's attention that #1 – although this is alleged I am not guilty of this habitual or any other act and that I think a fair bond would be much less than this. I would like to bring to the Court's attention that I have never had any type of escape, attempted escape or any other violation of the law as far as a jail break or anything else is concerned. This should indicate that such an outrageous bond be set that I would think that seeing the other defendant in this case, Marsha Lee, has a $5,000.00 bond and many other people before this very Court with records that are much worse as far as escape risks and so forth have much less bond than that and have posted them, as a matter of fact, right here in this court – that my bond should be set at perhaps $5,000.00 which would be much more realistic and that I still don't feel that I have no attachments here. I have a lot of equipment [32] that has been stolen from me and I am filing recovery motions for this equipment right here in this Court very shortly and several other things that actually do attach me to this community. I still feel that $5,000.00 would be perhaps even stern if anything.

I might also add there is no violence connected with this case and I don't think that any threat to society whatsoever is involved.

COURT:

Tell me in your own words, Mr. Reed, what you think filing motions with the Appellate Court is going to do with your trial date?

MR. REED:

Hopefully nothing. I am only hoping for an order from the Court of Appeals overturning some of this Court's decisions on confinement violations and we both know how the Court of Appeals works. I think they have this little tendancy [sic] that extends things for months at a time and that could, in fact, extend the trial date. I don't really know. I wouldn't even remotely attempt to outguess what they might rule. I just think that if . . . I don't really see where my presence in a society would hender [sic] anything whatsoever as far as punishment on society, danger to society and I think it would benefit about everyone concerned in all honesty, including and perhaps even paramount trial preparation.

COURT:

I agree more generally with the State than I do with [33] you, Mr. Reed, concerning the amount of bond. In view of the potential for extended incarceration that exists in this case together with what I perceive to be the limited period of time following your release date and the trial date we will be proceeding upon, I think a substantial bond is appropriate. In adopting that position I note the fact that there is a habitual offender charge attached to the filing in this case. I note also what I believe to be your lack of family in this community and that there is no apparent employment in this community. You have connections with other areas, including other portions of Indiana, but I would anticipate there are also connections out of state and since the Court is aware and you've cited me to cases involving yourself arising from other jurisdictions, I'm going to establish bond in the amount of

$25,000.00 I am going to make a condition of the posting of that bond and your release upon it that at the time of your posting and your release that you also not be subject to incarceration under any other court orders such as the time you are presently serving for the Federal government.

I simply don't know whether there are any other detainers or other proceedings involving you anywhere, but those would need to be addressed and complied with before the bond would be considered appropriate.

MR. REED:

There are no other proceedings, your Honor, that I am aware of.

COURT:

That's (inaudible) the point. There may be some other stuff around, but I don't know what they are. At the moment [34] you don't know of any other either?

MR. REED:

No, sir, I do not.

COURT:

O.K

MR. REED:

I have a mandatory release date from the Federal system. I think your Honor is aware of what that is – that by law they have to release me.

COURT:

I am aware through you . . . you've indicated to me on several occasions that you believe it's around August 31?

MR. REED:

Yes, sir. That's what the approximation that they have initiated in their conversation so far.

* * *

[37] COURT:

Do you have anything else to raise?

MR. REED:

No, sir. I don't think so, sir. I apologize for taking [38] up so much of your time, but it's all issues that I. . . .

COURT:

Just so we all know where we're coming from, the presently scheduled trial date as I recall is September 13. I had a substantial conflict that I can't get out of come up for that particular week. We were holding trial time available the next week and so I am going to have to change the trial date. We will be commencing Monday, September 19 and the trial will be scheduled for the next week and I anticipate it running at least a week, starting at 9:30 a.m. I will indicate to the parties . . . I think I previcously [sic] did that all proposed or preliminary or final instructions be submitted in the standard practice on the Friday before trial, so if I've given you a previous indication, that would be changed now to be available to me Friday, September 16.

MR. REED:

Will there be a witness subpoena date which I must meet for the witnesses I intend to subpoena for actual trial? Will there be a date and will that have changed since you have extended the trial date?

COURT:

I cannot tell you how long it takes to serve a subpoena because I don't know. If I were you, ask Earl Vance while I was walking back over to the jail how long it takes. The fact of the matter is that you have indicated that you are going to have some very special problems getting subpoenas delivered in some of these cases anyway.

MR. REED:

Yes, I will.

[39] COURT:

I would simply urge you to arrange for that as far before hand as you possibly can. There are rules relating to when a continuance is appropriate for failure to be able to obtain subpoena and you will need to comply with those if, in fact, you are unable to locate a witness and need a continuance accordingly.

MR. REED:

I was hoping I would get the procedure books. If I may ask one question. You have ordered that I be allowed to receive or choose two books at a time from the legal library. Should perhaps the Court make this more specific so that I have a means of getting this. . . . rather than just

a blank court order still leaves quite a bit of room for perhaps problems in my being able to get to this library, for instance.

COURT:

I thought leaving it as broad as possible with a clear intention expressed from the Court that you obtain the books would be the best method available to assure that you got them. What two do you want today?

MR. REED:

I would like to have trial procedure for #1 in rules of the court.

COURT:

That's one book. I have the 1983 Trial Rules book. We'll see that you get it.

[40] MR. REED:

I would also like to have – if it is in the same book or whether it's not – appeals court procedure.

COURT:

It's in the same book.

MR. REED:

O.K. I would like to look through that book alone for the statutes – Indiana statutes – pertaining to the law I'm charged with – if that is in one book.

COURT:

I'll send you the blue book on theft and the 1983 rules book. Do you have anything else to take up today?

MR. REED:

No, sir, your Honor. I want to thank you for your patience. I honestly appreciate it.

* * *

[COURT MINUTES, AUGUST 1, 1983]

* * *

Comes now O. Scott Reed individually and files Petition for Revision of Pre-trial Procedure and Relief of Violations as follows: (H.I.).

Defendant in Court in person and State in Court by Prosecutor for further pre-trial conference proceedings. The Court now makes inquiry into defendant's determination to represent himself including extensive warnings to the defendant of the dangers of such representation. Defendant now chooses to represent himself with attorney Humphrey on standby status only. Defendant makes oral motion for jail to provide him with hair cut. Motion taken under advisement. Defendant moves for availability of transcript of trial of Denver Manning held in Fulton Circuit Court during 1982. Upon determination by Court that transcript of such trial was produced and available for purposes of appeal by Denver Manning and because certain witnesses will identical [sic] to witnesses in that case, the Court now grants the said request and instructs court reporter to provide photo copies of Denver Manning transcript to defendant. Defendant now request [sic] that copy of court's order of July 15 be transmitted to the jail in order to assure availability of Library request granted. Defendant now request [sic] that the Clerk certify copies of all motions and pleadings prepared by the defendant and submitted to Court back to defendant so that he might have copies available for purposes of seeking appeal if he so desires. Request granted. Defendant now request [sic] modification of jail telephone rules in order that he might contact

potential witnesses. Request denied. Defendant now request [sic] determination of amount of bond in view of upcoming termination of federal sentencing. Arguments upon bond heard and the Court now establishes bond in the amount of $25,000.

Defendant now request [sic] opportunity for inspection of physical exhibits including cab and license plate. Request granted. Prosecutor to make arrangements for such inspection.

The Court now notes that because of conflict in trial schedule, trial will not be able to commence on the presently scheduled date of September 13. Cause now therefore set over to commence at 9:00 a.m., on Monday, September 19, 1983.

* * *

PETITION FOR REVISION OF PRE-TRIAL PROCEDURE AND RELIEF OF VIOLATIONS

[Dated] July 29, 1983
[Filed 8/1/83]
(Caption Omitted In Printing)

Comes now, O. Scott Reed, *pro se* counsel for defense, and requests revisions in court order dated July 15, 1983 stipulating pre-trial, and trial procedure as follows.

1. That the Court denied petition for dismissal or relief from violations pursuant to the Detainer Act because: "defendant has failed to provide any showing of the terms of the Act relied upon or the particular acts of the State to which he objects." Petitioner would remind the Court that he has filed proof of violations (see case TH 83-69C, filed in Federal Court at Terre Haute, Indiana) in the above court, and remind the court that he has, to this day, been denied all access to legal facilities, to all law books, and to any means of preparing defense, or submitting further proof of State violations. Petitioner requests full and complete hearing prior to final dismissal of Motion to Dismiss charges pursuant to Violations.

2. That petitioner has been, and still is, denied means to interview witnesses, or perspective [sic] witnesses, or to prepare for legal defense. The court denies aid of Stand-by counsel to transport perspective [sic] witnesses, and refuses to provide cost of transportation for perspective [sic] witnesses, (especially pauper witnesses, or witnesses with no means) to travel to the Jail. Petitioner is denied availability to interview witnesses, and is restricted from Witness interview by Jail policy.

Further, petitioner has requested use of phone, for contacting witnesses and aiding in defense. The court has limited phone to *one five minute collect call per week*, at a time when most witnesses are not available, and *if* petitioner should catch witness at home, and *if* the perspectivie [sic] should *accept collect call.*

* * *

4. It being apparent from the record, with oral argument, and submitted evidence, and denial of prior motions for relief of violations, that petitioner cannot receive a fair trial, and that irrepairable [sic] damage has occurred to prevent a fair trial, through the above listed violations, and court ordered restrictions on defense preparation, communication, confinement and prejudice, petitioner would suggest that because of the elapsed time of the above violations (over 3 months) and the limited time left for trial within the laws, and the violations listed above, that the charges should be dismissed, or that the court show where and how such violations can be cured within the legal standards for a fair trial. Petitioner believes this to be impossible and therefore would request dismissal of charges.

Respectfully submitted,

/s/ O. Scott Reed

Clerk of the Court:

Please prepare copies of this motion for all concerned, including Standby Counsel, Mr. Jere Humphreys, Plymouth, Indiana, and a copy for petitioner for court of appeals motion. Petitioner has full restrictions from legal

facilities or any method of producing copies from original in duplication.

Thank you,

/s/ Scott Reed

* * *

PETITION FOR SUBPOENA
FOR DEPOSITIONS UPON ORAL EXAMINATION, AND
FOR PRODUCTION OF DOCUMENTARY EVIDENCE

[Dated] August 10, 1983
[Filed 8/11/83]
(Caption Omitted In Printing)

Comes now, O. Scott Reed, counsel pro se in the above cause, and requests the following subpoenas for depositions upon oral examination and for production of documentary evidence as per rule 27, 28, 30, 45, and all other rules relating to, or granting, petition for subpoena, and per rules as set forth by the above court, and court order, whereas the court will set time and make arrangements for place of interviews, as follows:

* * *

4. That this is the first opportunity petitioner has had to file this petition since Court denied prior request of this nature, because of no available legal materials. Materials delivered by court order, August 9, 1983.

* * *

10. That fees, or funds for prepayment of travel expense be made available, where necessary, or means of transportation be provided to and from examination.

List of persons to be subpoenaed for examination:

1. Marsha Lynne Lee, Lot 18-B, Colonial Trailer Court, Argos, Indiana – Oral examination.

* * *

33. Rochester phone company, Keeper of the records, Rochester, Indiana. Documentary evidence – phone call records from July 1980 to March 1982, for phone 223-2265 (Scott Reed) and 223-2608 (M&S Salvage) and the name of person who can testify as to verification of these records.

Petitioner would remind the Court of its Order (7-15-83: 8-1-83) restricting petitioner from appointments of time and place, would request appointments and issuance be made as soon as possible due to approaching trial date and Detainer Act time limits.

The above is true to the best of my knowledge.

/s/ O. Scott Reed

The Clerk will please prepare necessary copies for all concerned and deliver same, as per court order.

Thank you.

* * *

MOTION IN LIMINE

[Dated] August 18, 1983
[Filed 8/19/83]
(Caption Omitted In Printing)

Comes now, O. Scott Reed, counsel pro se, and petitions the court to grant this Motion in Limine as follows:

1. The petitioner is above charged and scheduled for trial September 19, 1983.

2. That State's Record of Discovery indicates that he intends to use a transcript of an alleged conversation between Harold Van Cleve and O. Scott Reed, regarding a stolen vehicle on October 6, 1979.

3. That there is no evidence that such conversation was, in fact, taken from O. Scott Reed, or that the transcript is accurate.

4. That said transcript has been altered, and changed, on its face, and parts of transcript have been removed, and erased, and parts have been concealed, and made fraudulent.

5. That lack of credibility, due process, and fundamental fairness require transcript to be suppressed from trial.

Petitioner requests Motion in Limine be granted, and requests Court to instruct the State of Indiana, through the prosecutor, and his witnesses not to mention or refer to, or interrogate concerning said transcript, or attempt to produce or use said transcript in evidence, or at trial.

Respectfully submitted,
/s/ O. Scott Reed

Clerk of the Court:

Please prepare copies of this motion for all parties concerned as per court instructions.

Thank you.

* * *

PETITION FOR DISCHARGE

[Dated] August 29, 1983
[Filed 8/29/83]
(Caption Omitted In Printing)

Comes now, O. Scott Reed, counsel pro se, in the above court and causes, and requests the court to discharge petitioner for the following violations of law and procedure.

1. That petitioner is confined in the Fulton County Jail awaiting trial on above causes. That he has been granted release from all other detaining actions, including Federal Authorities. See attached "Mandatory Release" information from U.S. Department of Justice.

2. That petitioner is being detained contrary to Indiana law and procedure: 35-33-10-4, Article 4(c) . . . trial shall be commenced within one hundred twenty (120) days of arrival of the prisoner in the receiving state . . . but for good cause shown in open court . . . no good cause available as petitioner has petitioned court for trial within said trial limit (see petition on file dated 7-26-83, "petition for relief of violations" paragraph "4", and the court docket has included civil cases within allowed time, and misdemeanor jury trails [sic] not required in time limits, whereas criminal felony cases take precidence [sic] when petitioner is in jail. Also, extension of time was not requested by court or prosecutor, nor was it granted, and 10 day pre-time limit was violated by prosecutor whereas he has made no timely requests. Therefore the court should grant discharge as set forth in the detainer act, and by law.

3. That petitioner was illegally brought into this State, against his will, and after demanding a pre-transfer hearing, which was denied, illegally, and against the agreement on detainer acts, Article 4(a)(D), see motions in court files whereas petitioner filed proper requests in Federal Court (TH 83-69C), and petitioner was removed illegally. Also, the violation is under Article 9(7) whereas must be granted chance to contest legality of delivery. Acts 1981, P.L. 298, Sec. 2, Article 9(7) of detainer agreement.

* * *

Petitioner would ask the court to discharge petitioner for the above violations, as prescribed by law, and order treatment for temporary relief of pain and impairment because of illegal confinement, or if the court refuses to discharge petitioner, to order immediate release on recognizance bond, or set bond whereas petitioner may be released. (See attached petition for Bond Reduction.)

Respectfully submitted,

/s/ O. Scott Reed

dated August 26, 1983,
as mailed.

Clerk of the Court:

Please prepare copies for all concerned and schedule hearing as soon as possible under Emergency affidavit as submitted. Copies for prosecutor made available by court

Instruction as petitioner has no means of producing or delivering same.

Thank you.

* * *

PETITION FOR BOND REDUCTION

[Filed August 29, 1983]
(Caption Omitted In Printing)

Comes now, O. Scott Reed, counsel pro se, in the above causes and petitions the above court to grant this petition for the following reasons:

1. That petitioner is charged in the above causes.

2. That petitioner is scheduled for trial in the above court on September 19, 1983, or later.

* * *

5. That petitioner is counsel pro se, and is under illegal confinement in the county jail, and according to law should be released and discharged. See Court violation of 120 day maximum allowable trial date, Detainer Act Violation 1C 35-33-10-4 article 4(c); and petition for injunction, in the Court of appeals, dated 8-15-83 - 8-17-83, copy of which is in court files.

6. That petitioner is suffering severe illness due to illegal and improper confinement, and petitioner is under "specialist care" and doctor and hospital supervision, and petitioner is becoming permanently disabled because of improper confinement conditions, and failure of county to provide proper medical care because of "county lack of funds available", and that petitioners general health is getting rapidly worse and may require lifetime medical aid and rehabilation [sic]. That petitioner is now under heavy drug medication including "codeine" every 4 hours and other medication for "high blood pressure"

and "spinal inflamation" [sic]. Please contact Sheriff Richard McLochlin, or Dr. Steve Musselman, or Woodlawn Hospital for conformation [sic].

7. That petitioner is restricted from proper defense preparation by illegal confinement in county jail. See motions filed in above court and in court of appeals pending #5 above. And that release on bond would tend to cure many of the problems presented by the illegal confinement, such as defense preparation, and medical treatment restrictions.

* * *

10. That petitioner has filed for a preliminary injunction against the County Jail and the above circuit court which may, in fact, cause a[n] extended delay in trial date.

* * *

12. That petitioner is under Federal Supervision, by the U.S. Parole Commission, and as such, the location of petitioner is always available, and within reach of the Court.

For the above reasons, petitioner would request a recognizance bond be granted, as petitioner believes there is insufficient cause to detain petitioner, as to amount of suffering sustain by such detainment.

Respectfully submitted,

/s/ O. Scott Reed

Dated: August 29, 1983

* * *

Parole Form 1-11
(Rev. May, 1976)

UNITED STATES DEPARTMENT OF JUSTICE

Bureau of Prisons

United States Penitentiary
(Institution)

Terre Haute, Indiana 47808
(Location)

Certificate of Mandatory Release

UNITED STATES PAROLE COMMISSION:

It is certified that REED, Orrin Scott (name) 04217-059 (register no.) now confined in the United States Penitentiary, Terre Haute, Indiana

is entitled to 649 days statutory and extra good time deductions from the maximum term of sentence imposed as provided by law, and is hereby released from this institution under said sentence on August 29, 1983. Said person is released by the undersigned according to Section 4163 Title 18, U.S.C.

Upon release the above-named person is to remain under the jurisdiction of the United States Parole Commission, as if on parole, as provided in Section 4164, Title 18, U.S.C., as amended, under the conditions set forth on the reverse side of this certificate, and is subject to such conditions until expiration of the maximum term or terms of sentence, less 180 days on December 10, 1984. He is to remain within the limits of Northern Indiana.

This certificate in no way lessens the obligation of the person being released to satisfy payment of any fine included in the sentence; nor will it prevent delivery of said person to authorities of any state otherwise entitled to custody.

/s/ Larry K. Morrison
LARRY K. MORRISON, Acting
Administrative Systems Manager
for THOMAS F. KEOHANE, JR.,
Warden
(Warden or Superintendent)

This CERTIFICATE will become effective on the date of release shown on the reverse side. If the releasee fails to comply with any of the conditions listed on the reverse side, he may be summoned or retaken on a warrant issued by a Commissioner of the Parole Commission, and reimprisoned pending a hearing to determine if the mandatory release should be revoked.

Adviser **United States Probation Officer**

Probation officer **Paul E. Panther, CUSPO, Northern District of Indiana**

CONDITIONS OF MANDATORY RELEASE

1. You shall go directly to the district shown on this CERTIFICATE OF MANDATORY RELEASE (unless released to the custody of other authorities). Within three days after your arrival, you shall report to your parole advisor if you have one, and to the United States Probation Officer whose name appears on this Certificate. If in any emergency you are unable to get in touch with your parole advisor, or your probation officer or his office, you

shall communicate with the United States Parole Commission, Department of Justice, Washington, D.C. 20537.

2. If you are released to the custody of other authorities, and after your release from physical custody of such authorities, you are unable to report to the United States Probation Officer to whom you are assigned within three days, you shall report instead to the nearest United States Probation Officer.

3. You shall not leave the limits fixed by this CERTIFICATE OF MANDATORY RELEASE without written permission from the probation officer.

4. You shall notify your probation officer within 2 days of any change in your place of residence.

5. You shall make a complete and truthful written report (on a form provided for that purpose) to your probation officer between the first and third day of each month, and on the final day of parole. You shall also report to your probation officer at other times as he directs.

6. You shall not violate any law. Nor shall you associate with persons engaged in criminal activity. You shall get in touch within 2 days with your probation officer or his office if you are arrested or questioned by a law-enforcement officer.

7. You shall not enter into any agreement to act as an "informer" or special agent, for any law-enforcement agency.

8. You shall work regularly unless excused by your probation officer, and support your legal dependents, if any, to the best of your ability. You shall report within 2

days to your probation officer any changes in employment.

9. You shall not drink alcoholic beverages to excess. You shall not purchase, possess, use, or administer marihuana or narcotic or other habit-forming or dangerous drugs, unless prescribed or advised by a physician. You shall not frequent places where such drugs are illegally sold, dispensed, used or given away.

10. You shall not associate with persons who have a criminal record unless you have permission of your probation officer.

11. You shall not have firearms (or other dangerous weapons) in your possession without the written permission of your probation officer, following prior approval of the United States Parole Commission.

12. You shall, if ordered by the Commission reside in and/or participate in a treatment program of a Community Treatment Center operated by or contracted by the Bureau of Prisons, for a period not to exceed 120 days.

I have read, or had read to me, the foregoing conditions of mandatory release and received a copy thereof. I fully understand them and know that if I violate any of them, I may be recommitted. I also understand that special conditions may be added or modifications of any

condition may be made by the Parole Commission upon notice required by law.

_____	_____
(Name)	*(Register No.)*
WITNESSED Illegible	8/8/83 *(Date)*
_____ *(Title)*	

UNITED STATES PAROLE COMMISSION:

The above-named person was released on the 29th day of AUGUST, 1983, with a total of 649 days remaining to be served.

/s/ W. J. Seely
(Case Manager)

* * *

IN THE FULTON CIRCUIT COURT

CAUSE NO. S-82-53 & S-82-55

(Caption Omitted In Printing)

PRE-TRIAL CONFERENCE

BEFORE THE HONORABLE

DOUGLAS B. MORTON, JUDGE

FULTON CIRCUIT COURT

September 13, 1983

APPEARANCES:

Prosecutor for the State of Indiana

Richard A. Brown

For the Defendant - O. Scott Reed, Pro Se

Jere Humphrey - Stand-by Counsel

[3] COURT:

This is Cause No. S-82-53 and S-83-55, State of Indiana vs. O. Scott Reed. We have a trial coming up next week and a variety of motions and things to deal with.

Mr. Reed, since the last time you were in court I suggested casually to the sheriff that he might make arrangements for you to get a haircut without me having to order it. It doesn't take me very long to look at you and see that you haven't had one, so I am going to make a written order directing the sheriff to obtain services of a barber for you at county expense and direct that a haircut

be obtained for you. So as to get it some time to return back to normal, I'll try to have that done by Thursday . . . the haircut done by Thursday. The order will come down today.

At the present time we're scheduled to commence trial next Monday. I've got some things we need to work out. Mr. Brown, obviously we have motions of Mr. Reed's to deal with that have been pending - some of them for up to as much as thirty days. Do you have anything that you need to discuss at the present time?

MR. BROWN:

No, your Honor. I filed yesterday . . . in anticipating having a hearing tomorrow or yesterday, I filed a supplement to the record of Discovery with some information I was frankly not sure whether or not he'd gotten to begin with and a couple of times I knew he hadn't. The volume of information is great and I wanted to make sure everything was presented to him ahead of time. I just filed that yesterday and I [4] guess he probably just got the copies because we weren't over here yesterday. Beyond that, no, I have nothing. That's really not a motion or anything, but I wanted the Court to be aware of that.

* * *

[12] [COURT:]

I have a Petiton [sic] for Discharge which you submitted, Mr. Reed, dated August 29. The document is of substantial length and included a petition for bond reduction and an affidavit by yourself. Do you have anything to add concerning (inaudible) at the present time?

MR. REED:

The petition for discharge?

COURT:

Yeah.

[13] MR. REED:

Yes, sir. What I would like to do is use the law books here and just read sections right out of it pertaining to it as direct law if I may.

COURT:

All right.

MR. REED:

I'd like to start with Indiana 35-33-10-4 which is the agreement on Detainer Act in which I was brought into the State's custody and it says in Article 4(c), it says, "in respect of any proceeding made possible by this Article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, that for good cause shown in open court the prisoner or his counsel being present, the Court having jurisdiction of the matter may grant any necessary or reasonable continuance' and I would like to submit at this time – as I have in the petition for discharge – that any criminal offense that where the prisoner has been restrained from release or in bond – that (illegible) has preference over the civil or misdemeanor matters and people that are out on bond and that could be the only cause that I could see where the Court could possibly have granted a continuance which will be a month past 120 days . . . uh . . . trial the

first of next week and secondly, I would like to bring up the illegal aspects of my being brought into the jurisdiction whereas I submitted evidence already in this petition filed with Federal Court where that I, in fact, did file for a pre-trial or a pre-transfer hearing. I filed that with this Court in a [14] petition on February 23 and which the Court apparently didn't answer or whatever. I filed it with the Federal government which they denied. A copy of all this is in your records there. Also, I brought it to the Court's attention here as you remember as the first concern of mine when I was brought up for arraignment.

Also in the agreement that I was brought here under signed by Mr. Brown, he did, in fact, agree to abide by the rules of the Detainer Act and the Court did also – as you yourself signed it, your Honor, and where it, in fact, says that I should be granted hearing and that the Court and the prosecutor apparently agreed with this or they wouldn't have signed the Detainer Acts against me and that also on the back of the agreement, there is a place where if I ask for an attorney that this is also noted on there. Let's see if I can get this straight. The copy is upside down. "Agreement on detainers offer to deliver temporary custody" . . . it's dated March 21, 1983. It gives the provisions of Article 5 which I'll bring up in just a moment again and on the back of the paper, it has a place where I may request the Court to appoint counsel for this pre-transfer hearing which, of course, I did – both on the Detainer Act and in the motion filed February 23 with this Court which was either both denied or disregarded or the Court failed to rule on it.

COURT:

A pre-transfer hearing is a Federal procedure, is it not?

MR. REED:

Federal and State both as it turns out. I filed with the [15] . . . first I filed with the Federal Court on this and of course, I didn't get an answer at that time because I was brought here before the Federal Court could grant the hearing. They said that it must start out that I must ask the State court first which I did, in both the Detainer Act and by my motion of February 23 where I asked for an attorney to file the necessary things for this.

At any rate what happened was that it was all totally ignored or disregarded or whatever is proper and that I was brought against these rulings and I was not granted this and I did demand it – both of the warden of the United States District Court and also this court and it was denied by all three as it turns out.

What I would like to go . . . the next step is on 120 days . . . oh, on that article . . . I'd like to go back just a second.

On Article 9, #7 in the last paragraph . . . the last four lines is really all I think the Court is interested in. Where it says . . . the authorities having custody of the prisoner shall also advise him in writing of his rights of counsel, to make representations to the governor within 30 days and to contest the legality of its delivery.

Now this is set out in both Indiana Code 35-33-10-4 and by the Public Law Acts of 1981 in 298 in Section 2, whereas this is the law that I must be granted this and I

have not been . . . as a matter of fact, I have been denied this thing.

There is one possible exception to this where in one case that the Court did rule that petitioner should mention to the Court if trial date was going past this. On July 26 [16] in one of my motions – I think it's paragraph #4 – I did request that the Court, in fact, try me within this 120 days. The Court apparently chose not to or something because 120 days is long past and I was not tried. There is a mention of it in the Petition for Discharge in #2 where it says 'no good cause available if Petitioner has petitioned the Court within said trial limits. See petition on file dated 7-26-83 – Petition for Relief of Violations, Paragraph #4 and the Court docket has included civil cases within this allowed time and misdemeanor jury trials and where it goes on . . . et cetera . . . and back to the felony cases – do take precedent whereas I am confined in jail and another rule I felt Mr. Brown might try to slip by on is that on some cases there is a ten day pre-trial limit. Now this does not actually apply to the Detainer Act . . . where the prosecutor must file ten days before the time limit asking for a request or (illegible) time. He did not file this and therefore it could not possibly be used even under the 180 day trial limit which doesn't actually apply at all. It all boils down to one thing – that the Court and the prosecutor did agree to try me within 120 days when they accepted this petition for agreement on Detainer Act, that I asked the Court in Paragraph #4 that I just mentioned – to insure that I be tried which was a full 30 days before trial . . . the date was set . . . and that as a matter of fact, it has been totally disregarded and my trial date has moved right on now to five months rather

than four months – which will be five months . . . uh . . . the 24th of next week which will be the same week as my trial was set for.

[17] Ironically, immediately after my filing that, the Judge extended the time of my trial date – as a matter of fact – by one week from September 13 to September 19.

COURT:

Originally it was scheduled to start tomorrow and I've got a variety of things come up that I'm going to be out of town and so we set it over until next Monday.

MR. REED:

Yeah . . . yeah.

COURT:

Well, the document I think you are referring to has your date of July 29 on it which is the day you drafted it. It was received by me on August 1. It's a petition for Revision of Pre-trial Procedure and Relief of Violations. Paragraph #4 reads as follows: It being apparent from the record with oral argument and submitted evidence and denial of prior motions for relief of violations that petitioner cannot receive a fair trial, that irreparable damage has occurred to prevent a fair trial through the above listed violations. The Court ordered restrictions on Defense preparation, communication, confinement and prejudice. The petitioner would suggest because of the elapsed time of the above violations (over three months) and the limited time left for trial within the laws and the violations listed above, that the charges should be dismissed or that the Court show where and how such violations can be cured within the legal standards of a

fair trial. The petitioner believes this to be impossible and therefore would request dismissal of the charges.

[18] MR. REED:

No, sir. That's not the one.

COURT:

That's the only thing I've got from you that's dated in July, Scott. At least the only thing that has a caption on it that says Relief of Violations that's dated in July. I haven't seen anything where you've made a specific reference to the 120 days. I guess that was the purpose of you reading that.

MR. REED:

Well, it's in this other one. I think it's dated the 26th. The date on it is the 26 and the paragraph #4 does . . . here it is. Here it is right here.

Paragraph #4 says: The petitioner requests trial be held within the legal guidelines of the agreement on Detainer's Act, signed by the State of Indiana and by which the State of Indiana is in violation.

See the first motion filed before the Court which of course was that Federal thing that I brought in and . . . is forcing petitioner to be tried beyond the limits as set forth in the agreement on Detainer Act. Petitioner has filed oral motion and documentation before the Court, request of dismissal of charges which is pending and requests no extension of time be granted beyond those guidelines. The three month delay rests solely in the Court and irreparable damage has resulted and the

charges should be dismissed for the above reasons and violations.

[19] COURT:

What is the date of that?

MR. REED:

July 26, 1983.

COURT:

That's your hand-written date on it?

MR. REED:

Yes, yes. If you'd like, I can show you a copy of mine.

COURT:

Do you have any response to that, Mr. Brown?

MR. BROWN:

Yes, your Honor. My only response would be that even if . . . I think the law is clear that even if he has been brought here illegally, it does not effect the jurisdiction of the court or the power of the Court to try him. The only effect that I could see that would have would be if some evidence was obtained by virtue of assuming he is here improperly or we have exceeded our deadlines or whatever . . . some evidence was obtained by virtue of that or in the course of that . . . that might be admissible, but it is my understanding that so long as the Court has physical or personal jurisdiction over the person, how he got here does not effect the charge other than he's not entitled to a discharge because he was brought here illegally, so I think assuming all that's true, nowhere is it set forth that

the remedy for that is a discharge and it also provides – it was read somewhere – that while we may not have followed it . . . I'm not sure there was ever any hearing on it, the Court may grant continuances past the time period [20] for any necessary or reasonable . . . may grant any necessary or reasonable continuance. It's not a very strict standard, and I think the court had it set for this week and the court's continued it a matter of a few days and there was no objection to the setting at the time it was set. I just can't see any basis for discharge if that's what we're talking about. I'm not sure what else we'd address here to that motion.

MR. REED:

Your Honor, I think it's been apparent that I did raise an objection to the setting. As a matter of fact, I asked that it should be brought as was clearly indicated back within the 120 day line and secondly, the prosecutor is alleging that the petition rests solely on my being illegally brought into the state which the main issue is actually the 120 days which he agreed to abide by and the Court also when they signed these agreement [sic] and that this has been clearly and truly and absolutely violated against the rules of the Detainer Act, against public law, 298, Section 2 and against everything in this article.

COURT:

Today is the first day I was aware that there was a 120 day limitation on the Detainer Act. The Court made its setting and while there has been a request for moving the trial forward, there has not been any speedy trial request filed, nor has there been anything in the nature of

an objection to the trial setting, but only an urging that it be done within the guidelines that have been set out.

I'm going to deny the Petition for Discharge for those [21] reasons and for the reasons set out by Mr. Brown in his argument and showing that discharge s [sic] the appropriate remedy for any violations that occur.

MR. BROWN:

Your Honor, I just found what I was trying to find and it is kind of after the fact that I was thinking of a 180 day provision and there is such a provision in Article 3 of the agreement on detainers and that is a provision contained in the notice given to Mr. Reed at the Federal prison and that was the time limit I was operating under.

There is a 120 day provision in Article 4, but I'm not sure how they jive, but it would appear to me from the language in Article 3, the section that he cited, that the 180 day provision would be just as appropriate. (illegible) not real sure how they read together.

MR. REED:

No, sir, your Honor, that doesn't apply at all. As it turns out, the 180 days relates to an entirely different matter. Under Article 3 the 180 days relates to where – if I filed a petition to this Court for adjudication of the case – in other words, if I was forcing the Court to try me, the Court has 180 days to try me in or discharge me as it turns out and has no bearing whatsoever on this 120 days that in Article 4 that has me in custody, on temporary custody, from out of state . . . it would have to be Feder [sic] in this case . . . which is all related and that I still would maintain that my demand in Paragraph 4 of July

23 of my petition did, in fact, demand that the trial setting and that I did, in fact, complain [22] and that the prosecutor's argument has nothing to do with this case whatsoever in that what he's arguing is an entirely different set of laws and does not even pertain to the jurisdiction which I am here under. I didn't file for a final ruling on the cases or anything. I was brought here against my will and that entitles me to a 120 day limit and I did file – as a matter of fact – in Paragraph #4 a motion demanding that I was being violated #1 and #2 that I be tried within the 120 days.

Now I believe that any violation of that just is a mandatory discharge under the law and I've read considerable on it and every case says that.

COURT:

Mr. Reed, on August 31 I received a petition from you dated August 30. It's entitled 'petition for pre-trial transcript'. I don't have the foggiest idea what you want that you think I've got that is a pre-trial transcript.

MR. REED:

On the Court's ruling on the motions for this pre-trial hearing.

COURT:

Do you mean a docket sheet?

MR. REED:

Well, not just a docket sheet. I was asking for a transcript of our arguments and court's orders. A lot of these arguments were oral as you recall and. . . .

COURT:

And you want a transcript of what's gone on in these proceedings?

[23] MR. REED:

Yes. That was what I was asking for . . . the reason being as I indicated that I'd filed as you know to the Court of Appeals on some of these violations and I have since filed in the Federal court in South Bend. As a matter of fact, I have signed subpoenas against the court here and your Honor, himself, plus the sheriff of this county. I am, in fact, waiting for them to be served by the Federal court at this time.

COURT:

How long ago did you file them?

MR. REED:

I think about two weeks ago . . . ten days to two weeks ago.

COURT:

I haven't gotten anything yet.

MR. REED:

I in fact did file them with Mr. . . . was it you I filed them with?

MR. HUMPHREY:

That was just last week.

MR. REED:

That was Friday before last, wasn't it?

COURT:

Is there going to be a request for a stay come through?

MR. REED:

Possibly, I don't know. I filed for a preliminary injunction and a declaratory relief almost verbatim as I filed with the Court of Appeals in Indianapolis. I think you have a copy of that.

[24] COURT:

I don't.

MR. REED:

You see the Federal court requires that they administer all the copy . . . I cannot give you a copy.

COURT:

They do their own summons. I do know that.

MR. REED:

I already signed the things with the U.S. Marshall. I've already signed the summons for you and Mr. McLochlin as it turns out and I'm merely waiting for them to be issued.

* * *

[56] COURT:

So we would be trying this to a six-man jury?

[57] MR. BROWN:

I'm not . . . I guess we would. This was filed in December of last year. I was thinking it was an older case than this, but I guess it isn't in terms of filing.

* * *

[59] [COURT:]

What else do we need to talk about?

MR. REED:

Bond reduction and you haven't made any decisions on this pre-trial or pre-witness . . . pre-trial witness examination yet. That and my petition for reduction of bond which would solve about half of our problems if you granted it.

COURT:

I don't recall there being anything new presented in that bond reduction motion.

MR. REED:

The only part that really is new is that the last time Mr. Brown said that I had no reason to stay in this area . . . I believe there are several reasons which I would like to bring up. One being that I have a bunch of equipment that was sold in this county illegally by Marsha. She signed this off as my secretary and treasurer and sold a bunch of heavy equipment and so forth . . . some of it to Dimmitt up there at Argos and another place in Plymouth. I am going to get a civil action filed in this case naturally. These are all [60] reasons that I would have for

not leaving because we're talking about some very serious money.

Second, I was going to file charges on this land deal and of course, I'll file some suits on this including against Mr. Brown and his uncle, as it turns out. That's another indication that I absolutely will not be leaving this county and also against the jail for this permanent back injury that I've suffered over there because of lack of proper jail facilities.

I think all of these indicate that coupled with the fact that I don't have any escapes against me; I have absolutely no bond jumping against me; there is absolutely no indication whatsoever that I would be a hazard to society or that I would leave this area. Again, it would solve a lot of these problems in this pre-trial jail mess that if it is not allowed I am going to file a Motion for Continuance on that naturally because the jail has restricted me from this and this is contrary to this Court's very order and everything as I see it. It is surely a violation of fair trial [illegible] where indiscrimination – I might add – that Mr. Brown's allowed to visit his and I'm not allowed to visit mine. Now he's been coming up with a series of sayings and statements in the court that, in fact, that this is my bed and I should lay in it. I would like to read about a dozen Federal cases that says he is absolutely wrong and that I am a free person just like him. . . .

COURT:

Let's talk about bond reduction.

[61] MR. REED:

O.K. Well, I think that should a recognizance bond or one very low which is the only one that I can possibly meet as I think the Court is very well aware of this – would eliminate many of these problems and it's surely going to eliminate an awful lot of court action later if it was granted. I still don't see where I can be considered such a hazard to society or a threat to society or a threat to escape seeing as how I have never had anything relating to any of these issues ever charged against me.

COURT:

Do you have any response, Mr. Brown?

MR. BROWN:

I think the same that I had when the bond was set. I think I requested a higher bond than the Court set. I think given the habitual offender charge . . . a potential for thirty years (inaudible) enhance the sentence of thirty years plus the sentence on the Class D felony that the bond simply cannot be reduced to nothing or even a minimal amount. I think it's just the seriousness of the offense, the fact that he may have civil actions in this county . . . I really don't see – given the people involved – there may be a lot of money involved . . . involved . . . there may have been a lot of money involved and I don't know where it's going to come from anymore and I think that type of factor certainly isn't going to necessarily keep a person here if he had that choice or a thirty year sentence.

I think the bond is appropriate where it's at and it [62] should continue in that amount. It certainly should

not be reduced to nothing or even a minimal amount. It's my recollection it's set at $25,000.00.

MR. REED:

I understand that property out there was sold yesterday at an auction. I don't know this for a fact. If it has not been, that could, in theory, be a factor that could be considered.

COURT:

The sale was held up for a considerable period of time in order to determine whether you were going to appeal the previous rulings in that matter and nothing happened. I haven't received any notice of any sale and I wouldn't, but I frankly don't know whether it was or not. I haven't heard anything about the case for several months.

That's on the real estate as to the claim for sale of equipment. I don't know exactly how you'd go about a recovery of that. At the present time Marsha, of course, has a case pending in this court. She has requested pauper counsel and the examination of her at that time seemed to indicate that she had virtually no assets with which she is going to be able to obtain a defense. She did request a court appointed counsel. She has a job, but that is virtually . . .

MR. REED:

The equipment was sold, you know, illegally and she had no part in ownership whatsoever. It's still the law . . .

COURT:

Well, yeah, you're talking about recovery of the equipment itself?

[63] MR. REED:

Yes, right. By civil law which I already talked to Mr. Rakestraw about it . . . he right now actually is considering the case for the recovery. I haven't talked to him the last day or two, so I don't know what he's decided, but the equipment is located nearby . . . and whatever.

COURT:

He's in Indianapolis right now. I've had trouble tracking him down for a day or two. Well, I just have to recognize the previous record that you have, the fact that you were involved in a very substantial potential against you in this case, that the trial is close indeed and we would be talking about a difference of some six days. I did not make an earlier action upon the petition for bond reduction because I considered it to be a repetitive motion upon those that I had previously received and I will at the present time show it as denied. We'll leave the bond in the amount of $25,000.00.

* * *

[68] MR. REED:

What I would like to do at this time is I would like to guess you call it challenge the ruling or rebutt it here. To do this I need to read several Federal cases here that have taken over this State confinement problem directly and ask the Court to review this before he makes a final decision.

COURT:

If you have it written out in motion form you can submit it in writing and it makes for a better record. I will most certainly consider it. If you choose to simply cite the cases, I will read them. If you choose to read it into the evidence, . . . sorry, read it into the record at this time, you are perfectly well entitled to do that also.

I have my preferences that you not do it that way, but it's up to you as to how you want to do it.

* * *

IN THE FULTON CIRCUIT COURT
1983 TERM

CAUSE NUMBERS: S-82-53 and
S-82-55

(Caption Omitted In Printing)

ORDER

This cause being scheduled for trial on Monday, September 19 and there presently being certain matters at issue which require the Court's resolution, the Court now makes order thereon as follows:

1. Defendant's Motion in Limine dated August 19, 1983 relating to a certain transcript of conversation with a possible witness named Van Cleve is now GRANTED as to the transcript but without limiting reference to the conversation at the time of trial; should refreshing recollection become necessary, then such further rulings as to the transcript as may be contemplated by the rules of evidence will be considered.

2. Defendant's Petition for Revision of Pre-trial procedure and for Relief of Violations is DENIED.

3. Defendant's Motion in Limine relating to the State's use of prior convictions is GRANTED with the exception that use of prior convictions shall be allowed for purposes of cross examination should defendant elect to testify as per Indiana Law as described in the *Ashton* case and further the State will naturally be entitled to present its case concerning habitual offender status should it prevail upon the theft charge.

4. Defendant's Petition for Discharge dated 8-29-83 is now DENIED.

5. Defendant's Petition for pre-trial transcript is now construed upon explanation by defendant as a request for transcript of in-court proceedings as occurred in previous hearings and particular in hearing of August 1, 1983 and the same is now DENIED.

6. Defendant's Petition for appointment of Public Defender in which defendant requests a public defender for purposes of civil filings for alleged rights violations is now DENIED; the Court does now again offer to the defendant the opportunity for Public Defender to represent him in this proceeding and defendant again rejects such offer and elects to proceed as his own counsel.

7. Defendant's Motion in Limine date 9-7-83 is GRANTED to the extent that it deals with a South Bend Police report subject to a determination during the course of trial as to the necessity of use of such documents. As to other matters, Motion in Limine is now determined to not be an appropriate vehicle for addressing the admissibility of such documents and the motion in limine is DENIED subject to redetermination as to each document upon its admissibility at the time of trial.

8. Defendant's Petition for Advancement of Fees is now considered and upon representation of stand -by [sic] counsel Humphrey as to possible procedure for disposition of subpoenas, the Court now takes the said petition under advisement pending report by attorney Humphrey as to the necessity of advancement in the case of any particular subpoena.

9. Defendant's Petition for Bond Reduction is now heard and DENIED. The Court notes the repetitive nature of such petition.

10. The Court now again hears argument from defendant concerning his inability to obtain witness interviews in the jail. The Court now notes and reaffirms the position of its July 15 Order authorizing the defendant to take any deposition he deems necessary and notes that to date no request for scheduling for depositions has occurred and Court is now informed by stand-by counsel that he believes none is anticipated.

11. The Court now notes that it is made aware of a medical disorder relating to defendant's back, and that the court's first awareness of such situation was raised in his petition for appointment of Public Defender submitted on September 2, 1983; the Court now notes that further activities by the Court in dealing with such medical disorders do not now appear to be necessary for purposes of trial preparation or for the defendant's safe incarceration and that any activities relating to a potential change of defendant's status or location would only serve to make his trial preparation more difficult. Accordingly, the Court has determined that at present no further orders are necessary thereon.

12. The Court now notes that the charge in this cause is a Class D felony and that accordingly, the Court anticipates that a six man jury will be selected together with one alternate and in scheduling of the trial the Court has indicated that it anticipates completion of jury selection Monday morning with the State to proceed with its case with anticipated completion by the end of the Court

day Tuesday and defense, if any, anticipated to commence Wednesday. Such statement is made for purpose of assistance in issuance of subpoenas.

DATED this 13th day of September, 1983.

/s/ Douglas B. Morton
Douglas B. Morton, Judge
Fulton Circuit Court

* * *

MOTION FOR CONTINUANCE

[Dated] September 16, 1983
[Filed 9/19/83]
(Caption Omitted In Printing)

Comes now, O. Scott Reed, counsel pro se, and shows unto the court that he is confined in the Fulton County Jail under the above causes, and $25,000 bond. That he has been granted pauper status by this court, and is under the jurisdiction of the above court, and the care and custody of the Fulton County Sheriff. That he is scheduled for jury trial on September 19, 1983. That petitioner requests a continuance in order to correct the below violations of trial preparation and proper defense, and that granting of the requested continuance is necessary in order to have a fair and meaningful trial.

1. That the Fulton County Jail has flatly refused to permit any pretrial witness interview. This has in fact subjected petitioner to "surprise witness" presentation at trial, discrimination over prosecution, violation of law and civil rights, and restricted of defense preparation.

2. That petitioner has been restricted from pretrial examination of prosecution witnesses.

3. That petitioner has been refused and restricted from obtaining documents for discovery and trial use by the Fulton County Jail.

4. That although the court has, this week, tried to "overcome taking of depositions", it is not possible to interview 50 witnesses and obtain documentation in 3 days whereas subpoenas were requested one month ago, and still not issued.

5. That many of the above witnesses are Hostile, and pretrial witness examination is necessary for proper and meaningful defense.

6. That discovery violations prevent filing of discovery record, and use in trial of the above and below evidence which would prove petitioner's innocence.

7. That petitioner was forced to present witness list on pretrial discovery to prosecutor for pretrial interview and petitioner was in fact discriminated against in that he was denied same.

8. That action in the U.S. District Court, filed against circuit Judge and Sheriff, charging violations of civil rights, which is pending, requires judication [sic] or showing of court that it is not prejudicial to petitioner.

9. That petitioner has filed with the court, information, showing that petitioner is suffering "severe illness" . . . is under "specialist care" and hospital supervision, . . . for "Spinal Inflamation" [sic] and "High Blood pressure" . . . and is being restricted from proper medical treatment, contrary to "Doctors Orders", "is under heavy drug medication including 'codeine' every four hours", and is suffering great mental pain, and impairment, and is restricted from proper defense, therefrom, and shows unto the court that petitioner cannot properly aid in his defense, and asks, once again, for relief of restrictions, proper medical care, and hospital treatment and care as requested by "Specialist", and a continuance "only until proper treatment has been completed." See: petition for appointment of public Defender; and petition for Bond Reduction, in court record.

10. That new discovery has been filed by the State whereas "new witnesses, change of witnesses is made, and petitioner requests short delay, by which these witnesses can be interviewed etc.

11. Petitioner would remind, and request of the court to adhere to: Johnson vs. State, 384 N.E.2d 1039(7) whereas: "Court should allow maximum possible amount of information with which to prepare this case in advance of trial."

And to grant a short continuance for the above reasons, and to order relief of confinement violations as requested by petitioner.

Sworn to under penalties of perjury, as true to the best of my knowledge and belief.

/s/ O. Scott Reed

Clerk: Please prepare copies for all related parties as per court instructions.

Thank you.

* * *

In The Fulton Circuit Court

CAUSE NO. S-82-53 & S-82-55

(Caption Omitted In Printing)

PRE-TRIAL HEARING

BEFORE THE HONORABLE

DOUGLAS B. MORTON, JUDGE

FULTON CIRCUIT COURT

September 19, 1983

APPEARANCES:

Prosecutor for the State of Indiana

Richard A. Brown

For the Defendant – O. Scott Reed, Pro Se

Jere Humphrey, Stand-by Counsel

[3] COURT:

It is right at the hour of 9:30 on the morning scheduled for trial in the matter of O. Scott Reed. We've got a couple of substantial preliminary problems that have come up this morning.

The Court has received and not yet gotten file stamped a Motion to Change of Judge filed by Mr. Reed this morning. In addition, the Court has had under advisement up until this time a Motion for Reconsideration of July 15 Order. The Court will deny reconsideration of its order. It has reconsidered and it will not modify its order of July 15.

The Court further finds that the Motion for Change of Judge is not well taken or timely. It is based on the defendant's filing of a cause of action against the sheriff and the Fulton Circuit Court in Federal District Court for the Northern District.

Since every case has preliminary motions and since a defendant would always have the right to file an action based upon any preliminary rulings – it that were the basis for a grant of change of judge, nothing could ever be decided because the defendant could simply file it anytime he chose and disqualify the judge that is hearing the matter. Certainly there is nothing that has been directed against me personally and it isn't anything that has caused a problem for me.

Mr. Reed, did you have an opportunity to talk with Mr. Humphrey concerning the newspaper article that appeared Saturday?

[4] MR. REED:

Yes, sir, I did.

COURT:

Let me read into the record so that we know what we're talking about here what it is that has occurred.

As you will recall, the Court granted a Motion in Limine which barred the State from reference to any prior criminal record the defendant might have, subject only to use of such prior record as it relates to cross-examination of the defendant should he choose to testify and every indication from the defendant thus far is that he will not testify. In addition then keeping the State . . . allowing the

State to present such evidence that may be necessary for proof of the habitual offender charge.

In any event the jury was not to be made aware of any prior criminal record.

Before consideration of that habitual offender charge – if in fact, the defendant was convicted of the felony charge (inaudible).

Well, the newspaper article that appeared in the Saturday newspaper . . . front page . . . is entitled "35 Called for Trial Here. Thirty-five prospective jurors have been called for possible duty beginning Monday at 9:30 in the Fulton Circuit Court for O. Scott Reed's trial on theft and habitual criminal charges. Reed, 52, is accused of taking $4,666.00 from Auto Owners Insurance Company in November 1979 after falsely reporting a car as stolen. The habitual criminal charge is linked to alleged previous felony convictions [5] between 1954 and 1980. Reed has been in Fulton County Jail since April when he was transported here from the Federal penitentiary in Terre Haute. The two charges to be tried next week were filed in 1982. Ten people named in the list of forty-five prospective jurors have been excused for age and medical reasons. Those who are to report at the courthouse Monday by township are: "and then a listing of the jurors appears.

So what we end up with is a newspaper article that includes the jurors names and is therefore likely to attract their attention and a listing of the habitual. . . . well, a direct reference to the nature of the habitual criminal charge and the time frame of previous felony convictions without identifying them specifically.

Mr. Reed, it appears to me that in view of that we can do one of three things. Frankly, I'll do which ever one you want.

The first one is – you can waive any error that that may have created and we can go ahead today.

The second one is – we can simply continue the trial today and on the theory that this isn't going to go away over a short period of time, we can simply reschedule the trial for sometime substantially in the future and I would guess that's going to be late October to early November before I can possibly get the matter back into court if we were going to wait any substantial period of time.

The third thing is – that last Friday my trial for next week settled and that alternative is therefore available . . . [6] that we could simply recommence. . . . that I could excuse the jury that was called today on a mis-trial caused by that article, contact the newspaper to make sure we don't have a repeat, issue a new venire and call in new jurors for a week from tomorrow and commence the trial at that time.

Mr. Brown, thus far I haven't let you get a word in edgewise. How do you feel about that?

MR. BROWN:

It's up to you as far as I'm concerned. It's definitely a problem. I'm not going to jump up and down one way or the other, I guess.

COURT:

How do you feel about it, Mr. Reed?

MR. REED:

Well, your Honor, I think #1 that naturally I do not waive the error. I think it's quite obvious to everybody that it would definitely be an error in that the jury has read this. If they hadn't have read it, it would be brought to their attention by all their friends and everything and you are right, I am not taking the stand. It would, in fact, have to constitute an unfair trial.

Secondly, I would think that because of the Court's scheduled case that if the Court would accept the responsibility of showing that no error was caused in a trial at some short date which I don't believe can be done because in this county especially . . . this is a very big event. I think that everybody has to have known about it that would be connected with the jury and prospective jury and I couldn't [7] possibly get a fair trial with them knowing this.

I would actually move for a change of venue at this time and for some other reasons that I'll bring to the Court's attention when I'm allowed to answer some of these other motions orally.

I would again ask the Court in the light that it has already violated my 120 day maximum triable time for this. If the Court should find that I must stand trial here and that it's a further violation of my 120 day maximum time that I should be granted an immediate recognizance bond because it's not defendant's fault.

COURT:

It's not the State's fault either.

MR. REED:

No, I realize that, but I don't believe I should be made to suffer because . . . uh . . . still I'm an innocent person by law and I'm suffering great pain and damage from confinement as the Court's been made aware of by the Federal charges and at the end of this time I don't think I would be capable of standing trial. I think I'll probably be permanently confined to a hospital.

COURT:

I guess I didn't understand what you were trying to say concerning the Court accepting responsibility for a short duration. Ask me again.

MR. REED:

What I meant was that if the Court will accept the responsibility that these juries could hold a impartial and [8] fair trial, that they have not been influenced by this article or have read it and there would be no error against the defendant's rights to a fair trial. I'd like to have it be shown in the record that I did move for a change of venue and that I don't believe it can be done.

COURT:

I tend to agree with this jury – the people sitting out in the hallway now. What I'm suggesting is that we call . . . we excuse these people and I would call a new jury and let them come in Tuesday with no kind of pre-trial publicity that this one's gotten. . . . simply no cross reference to the other article. There would be a newspaper report, no doubt, that this trial was continued and I would report to them that it was simply done for procedural reasons and then make it known to them – not for

publication – but make it known why we had to continue and request that although they will treat it as a newsworth [sic] story that there is a jury called for next Tuesday and it is your trial upon the charge of theft.

By the way, it's not the reference to the Auto Owners and the amount and the dates that are involved since all those other things will quite properly be submitted to the jury anyvay [sic] and probably will even have to be discussed during voir dire, but it is, of course, the reference to the prior charges.

If I may say so, Mr. Reed, it appears to me that a motion for change of venue from the county is substantially premature at this point. There is certainly nothing that would show [9] that everybody in the county is tained [sic] by this. People tend to read these and forget about them if they're not directly involved. I would suggest to you that if you are, in fact, concerned that we are going to have a tained [sic] jury next week that the way to handle that is to go ahead, call them in next week and then bring them in individually and examine them and fine [sic] out if there is some thing that they know about. . . . if they know you from anything previously or ever heard of you. If we have a variety of reports from jurors saying, 'Oh, yeah, I know him. I read about him all the time in the time in the newspaper and I don't know if I could give him a fair trial or not because I know he has a substantial or something like that." Any kind of a comment like that . . . we simply exclude them and then if it turns out that we can't get a jury, then your motion for change of venue may well be appropriate, but that seems to me to be the most reasonable way of approaching that. Bring them in a week from now and then. . . . the Court

could simply reconsider the motion for change if it turns out that we can't get a jury . . . an unbiased jury. I don't perceive that to be the case right now. The Manning trials, the Scurlock trials . . . all of these are incidents that are related to the same location out there and frankly, it was not difficult in those cases to find people who were just unaware of anything that was going on. You tend to think that it's big news and important stuff to those of us that are right here involved in the middle of it, but the man on the street is much less atuned [sic] to it. How does the grab you?

MR. REED:

Well, I think . . . like I say, and I think the Court is aware that the habitual criminal charge and previous felony convictions, you know, plus just transport here from the Federal penitentiary from Terre Haute has to impress a great deal in this county. . . .

COURT:

I'm no arguing with you. I agree with you.

MR. REED:

And I just cannot believe that a fair trial can be had in a county where this is so small a population and where a news item of this. . . . becomes quite an incident! I just cannot believe this, especially in light of all the prior publicity from out at M & S Salvage.

COURT:

If that turns out to be a substantial problem, then we will find out about it at the time we have a jury that's not tainted with the habitual criminal story appearing in the

same article with their names. I perceive that as a real problem. But if we get them in here and people are uniformly reporting, 'Yeah, I know all about this.', that seems to me to be an appropriate time to reconsider that, but I don't see that a continuance for eight days – in order to obtain an untainted jury and to then proceed is an inappropriate method for proceeding.

Mr. Brown, does trying to commence this trial a week from tomorrow cause you any hideous scheduling problems with a gift of one week now can't cure?

[11] MR. BROWN:

Well, I don't know. What was it – a civil case that went out?

COURT:

For me it was a civil case and it was, in fact, a case that I was going to be trying in Cass County although my staff was going to be involved.

MR. BROWN:

I suspect it wouldn't. I can't think of anything. What are we talking about date-wise?

COURT:

It's starting September 27 and would probably run through 29 or 30.

MR. BROWN:

I can't think of anything but it shouldn't if you were going to be gone anyway. The primary (inaudible) was here so . . .

COURT:

If I didn't have you tied up, you probably weren't?

MR. BROWN:

Probably not or at least something that couldn't have been changed. The only thing, I think, that caused a problem and that would be for both of us and that would be the fact that people are so wide spread in this.

COURT:

You've got subpoenas to deal with. Yeah, I understand that.

MR. BROWN:

To do that all over again just to see if we're going to get one next week – that would be the only problem I could see.

[12] COURT:

I frankly don't perceive getting an unbiased jury in this case as a problem. I really don't. Now I could be surprised and people could come in here and that could turn out to be a real problem, but I don't foresee it.

Do you think you could get your witnesses realigned?

MR. BROWN:

Yes.

COURT:

Mr. Humphrey, treating the subpoenas that have been issued up until now as continuing and directing any

person who has received such a subpoena to reappear instead of the scheduled date of Wednesday, the 21st, instead for the same time on Thursday, the 29th. . . . with that proviso, do you see any difficulties with your scheduling?

MR. HUMPHREY:

I could just move things out. I've just got hearings that . . . you know, the judges in Marshall County realize should be subordinate and I shouldn't have any trouble.

COURT:

Could you move them all up to this week?

MR. HUMPHREY:

I don't think so.

COURT:

Mr. Reed, you keep waving your hands and suggesting you. . . .

MR. REED:

Yeah, I think it would be better and I would ask the [13] Court to make this in October or November . . . the earliest time. This would eliminate all the possibilities existing right now plus it would also allow the Federal judgment would probably be (inaudible) at that time which is against your Honor and this court. I think that would also be moved out of the way and. . . .

COURT:

I would be startled if that matter were concluded by then. You know, getting a case concluded in six

months . . . a civil case concluded in six months in Federal court is the speed of light. They don't happen that fast.

MR. REED:

But I'm sure of one thing . . . we've had a great deal of problem with the witnesses because of . . . you know, I haven't been able to conduct any pre-trial interviews as to this date as you know. I've been restricted. I've filed several motions on that.

One I think it would be proper in that it would also – if the Court should so find – that I be allowed to have my pre-trial witness examination and I would like to renew my motion for depositions, too.

COURT:

Mr. Reed, let's discuss the issue at hand.

MR. REED:

O. K.

COURT:

You are suggesting – as I understand you – that of the options that I gave you: #1. go ahead with it; #2. continue it and try it next week or #3. continue it to a late October [14] date. Of those three, you are requesting that we take the third?

MR. REED:

Yes, I am, your Honor.

COURT:

How does that grab you, Mr. Brown?

MR. BROWN:

It's fine with me. I think if that's what the defendant wants to do, it's more up to him than it is me. I think it's better in the sense from our standpoint and his, too, except he's in jail in realigning the witnesses, we got a lot more time to do it and you don't have the possibility of it going out again and having to call them all again and saying it didn't work again. I certainly have no objection to that.

COURT:

Do you have a two-month tour of Europe coming up or anything like that, Mr. Humphrey?

MR. HUMPHREY:

No. To make it easier for scheduling, there just isn't anything my first week in November that I couldn't move out.

COURT:

There is for me, but it's nothing that I can't cure. The jury's all checked in?

MRS. WALTERS:

Yes.

* * *

[Court Minutes, September 19, 1983]

* * *

Defendant in Court in person and accompanied by stand-by counsel Jere Humphrey. Also present Richard Brown, Prosecutor. Defendant now files written motion for change of Judge which motion is as follows: (H.I). The Court now denies the said motion for change of Judge as not being timely filed. In addition, the Court notes that it has previously taken under advisement the reconsideration of its July 15 order; the Court now denies modification of that said order.

The Court now notes for purposes of the record the newspaper story of September 17, 1983 as it appeared in *The Rochester Sentinel* which includes the names of prospective jurors as well as the nature of the charge in Cause Number S-82-53. It now appears that such reference is inappropriate.

Discussion amongst parties held and the Court indicates possible proceedings as follows: (1) that trial may continue at this time wihout [sic] further reference to the newspaper article, (2) that this jury panel may be dismissed and that the cause be reset for trial Tuesday, September 27, eight days from the present trial date with a new jury panel, called and with appropriate indications to the newspaper to avoid such future problems or (3) that the case be continued for a period of time presently estimated to be one to two months. Discussion held and dependent now indicates his desire that this cause be continued at this time and that it not be reset for hearing on September 27 but that instead continuance of approximately one month's duration be undertaken. Request

granted. Prospective jurors which have been summoned are now discharged and mistiral [sic] thereon declared.

The Court now further receives defendant's motion for continuance which motion is as follows: (H.I). The court now notes that such Motion is now made moot by court's previous rulings this date. The Court notes however that such motion for continuance does not appear to be well taken in that now showing has been made that any change of circumstances is likely to occur before trial and that defendant's circumstances at time of trial will be as alleged in his petition at any subsequent trial date.

The Court now directs that photo copies of written motion for change of judge and motion for continuance be submitted to J. Humphrey and R. Brown.

* * *

[Court Minutes, September 27, 1983]

* * *

Cause now reset for trial by jury for 9:30 a.m. Tuesday, October 18, 1983 with defendant to appear for trial at such time.

Court personally informs defendant of trial date and time with note that proposed preliminary and final instruction be submitted on or before October 14, 1983.

* * *

[Court Minutes, October 3, 1983]

* * *

Court now makes aware of certain bond language with defendant's bail bond relating to where defendant may go. Such language indicates defendant shall not leave the *jurisdiction* without approval of Court. The Court now indicates that it believes such language restricts defendant to the State of Indiana. (not just Fulton Co.) and that this Court has no limitation to his travel within Indiana.

* * *

[Court Minutes, October 18, 1983]

* * *

State in Court by Prosecutor and Defendant in Court in person and with stand-by counsel. Defendant renews all previous pre-trial motions. Court reiterates previous rulings but notes that defendant posted bond by corporate surety on Wednesday, Sept. 28, 1983 and that many arguments raised therein may be mooted. * * * Defendant renews request for change of venue from judge and submits record from S-83-9423 in Federal District Court. Motion Denied. Defendant now supplements witness list orally.

* * *

Prospective jurors sworn and voir dire held. Jury with one alternate selected, sworn, and impaneled. * * * Opening statements made and State commences evidence.

* * *

[Court Minutes, October 21, 1983]

* * *

Defense continues presentation of witness and rests. Defendant moves for appointment of counsel. Upon interview of defendant, the Court now determines that such appointment is appropriate and now appoints attorney Jere Humphrey, stand-by counsel to complete trial matters. The Court makes inquiry as to defense intention to re-open and defense indicates now that it has no necessity to re-open for presentation of further evidence. State presents rebuttal evidence and rests. Defendant has no sur-rebuttal evidence.

* * *

[Court Minutes, October 22, 1983]

* * *

Final arguments delivered and the Court delvers final instructions to the Jury. Jurey [sic] retires for deliberations at 11:00 a.m. and Court discharges alternate juror.

At 4:25 p.m., jury returns verdict as follows:

"We, the jury, find the defendant guilty of theft.

* * *

Date: 10-22-83 William F. Parman,
Foreman "

The Court returns jury to jury room and now makes findings upon verdict and enters judgment of conviction upon charge as Class D felony. Arguments heard upon preliminary instructions for habitual offender proceeding and preliminary instructions agreed to. The Court now delivers preliminary instructions and parties make opening statements. State presents evidence and rests. No evidence presented by defendant. * * * Final arguments delivered and Court delivers final instructions to jury. Jury retires for deliberations at 5:45 p.m. Jury returns verdict at 6:30 p.m. as follows:

"We, the jury, find the defendant O. Scott Reed to be a habitual offender.

Date: 10-22-83 William F. Parman
Foreman "

Jury discharged. Defendant remanded to custody of Sheriff and Court now orders Fulton Co. Probation Dept. to prepare presentence investigation report and recommendation. Cause now set for sentencing hearing for 9:00 a.m., Monday, November 14, 1983.

* * *

O. Scott REED, Appellant.

v.

STATE of Indiana, Appellee.

No. 484S143

Supreme Court of Indiana.

April 7, 1986.

Defendant was convicted by jury in the Fulton Circuit Court, Douglas B. Morton, J., of theft and was determined to be habitual offender, and received four-year sentence, which trial court enhanced by 30 years because of habitual offender determination, and defendant appealed. The Supreme Court, DeBruler, J., held that: (1) defendant failed to preserve for appeal issue that defendant was not tried within 120-day limit required by Interstate Agreement on Detainers; (2) circumstantial evidence was sufficient to prove defendant's identity as caller so as to render transcript of telephone conversation admissible; and (3) evidence was sufficient to prove beyond reasonable doubt that defendant was same person who committed prior felonies introduced at habitual offender hearing.

Affirmed.

Jere L. Humphrey, Plymouth, for appellant.

Linley E. Pearson, Atty. Gen., John D. Shuman, Deputy Atty. Gen., Indianapolis, for appellee.

DeBRULER, Justice.

This is a direct appeal from a conviction of theft, a class D felony, I.C. § 35-43-4-2, and from a habitual

offender determination. I.C. § 35-50-2-8. A jury tried the case. Appellant received a four year sentence for theft which the trial court enhanced by thirty years because of the habitual offender determination.

Appellant raises eight issues on appeal: (1) whether trial court erred in not discharging him pursuant to the Interstate Agreement on Detainers Act; (2) whether trial court erred in refusing his tendered "circumstantial evidence" instruction; (3) whether trial court erred in giving a "greatest weight of the evidence" instruction in a criminal case; (4) whether trial court erred in admitting into evidence a transcript of a telephone conversation which allegedly involved him; (5) whether trial court erred in not admitting into evidence on cross-examination a report mentioned on direct examination; (6) whether trial court erred in not permitting him to cross-examine a police officer concerning the location of a confidential vehicle identification number, (7) whether trial court denied him due process in permitting him to represent himself without, at the same time, affording him direct access to witnesses and legal facilities; (8) whether trial court erred in admitting into evidence at the habitual offender proceeding State's Exhibits #1, #2, #3, #4, and #5.

These are the facts from the record that tend to support the determination of guilt. In June 1979, the Wabash Valley Bank foreclosed on its security interest in a 1977 Ford pick-up truck, identification number F14 SCY 89 261. Wabash Valley Bank then sold the truck to the appellant for thirteen hundred dollars in cash. In August 1979, the First National Bank of Rochester loaned M. & S. Salvage four thousand dollars; the same truck became the

collateral for the loan. Appellant signed the note. The First National Bank of Rochester regarded appellant as the owner of M. & S. Salvage, and the appellant had communicated to others that he was the owner of M. & S. Salvage.

On October 6, 1979, appellant reported the same truck as stolen from a K-Mart parking lot in South Bend. Auto Owner's Insurance Company paid $4,660 on the resulting loss claim. Marsha L. Reed had title to the truck and the insurance company had issued the policy in her name. Marsha Reed was actually Marsha Lee, a woman with whom appellant was living at the time. The insurance proceeds were used to pay the remaining sum of $3,101.52 to the First National Bank of Rochester on the note that appellant signed.

In February 1980, state police, in executing a search warrant on the premises of M. & S. Salvage, discovered a license plate, issued to Marsha Reed for the same truck. A computer search indicated to the police that the truck had been stolen. A woman, who lived with a M. & S. Salvage employee, told the police that she saw M. & S. Salvage employees transferring parts from a blue pick-up truck to a red pick-up truck. Robert Smith, another employee, told the police that he had paid the appellant $300.00 for a frame and running gear on which he had placed his blue cab. Smith never received a certificate of title from appellant for the frame. Subsequently, Smith sold the reconstructed truck to Shelton under the old blue truck's certificate of title. Police in Tennessee located Shelton's truck, and then discovered a concealed vehicle identification number on its frame. The number was F14 SCY 89 261; the same number on the frame of the truck appellant

reported stolen from the K-Mart parking lot in South Bend.

I

Appellant argues that the trial court should have discharged him pursuant to the Interstate Agreement on Detainers (IAD) I.C. § 35-33-10-4 because he was not tried within 120 days of his arrival in Fulton County. The pertinent sections of the statute are set forth here:

> Art. 1 – [It] is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints.
>
> Art. 4(c) – In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty [120] days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.
>
> Art. 5(c) – If the appropriate authority shall refuse or fail to accept temporary custody of said person or in the event that an action on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article 3 or Article 4 hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

The record indicates that the Federal Penitentiary at Terre Haute transferred him to Fulton County on April 27, 1983. On May 4, 1983, on May 23, 1983, and on June 20, 1983, appellant filed separate motions alleging that his transfer to Fulton County was in violation of the IAD; he also requested a hearing on the matter. On June 27, 1983, the trial court set the trial date for September 13, 1983; which was beyond the requisite 120 day period. Appellant did not object to this trial setting. On June 29, 1983, he filed a Motion for Relief from Violations. In the motion he alleged violations of IAD § 35-33-10-4, art. 5(d) and 5(h). These allegations related to appellant's care while in the custody of Fulton County and not to the 120 day limit. On July 15, 1983, the trial court in an order made the following ruling concerning appellant's previous IAD motions.

> "That upon defendant's motion for dismissal or 'relief from violations' pursuant to the Detainer's Act, the Court does now deny the said motions; defendant has failed to provide any showing of the terms of the Act relied upon or the particular acts of the State to which he objects. There appearing on its face no violation of such Act, the court does rule accordingly."

Despite this ruling's emphasis on appellant's failure to allege specific violations of the IAD, as of this ruling, we discern that appellant alleged one specific violation: that is that Fulton County violated article 5(d) and 5(h) of the IAD in regards to the type of care he was to receive while in their custody. However, it was not until July 26, 1983, that appellant made a general demand that trial be held within the time limits of the IAD. In a pretrial conference, on August 1, 1983, the court conducted an extensive

hearing on the IAD, however, appellant did not reiterate his objection based on the time limit. Subsequently, the trial court reset the trial date from September 13, 1983, to September 19, 1983. Appellant did not object to this resetting. Between August 1, 1983, and August 29, 1983, appellant's actions indicated that he intended to proceed to trial on the date as reset i.e. he filed a motion in limine, a petition for subpoena, a petition for depositions upon oral examination, and a petition for production of documentary evidence. On August 29, 1983, he filed an Affidavit of Emergency, alleging that the 120 day period had passed and that the charges against him be dismissed.

A defendant applying for discharge pursuant to the Interstate Agreement on Detainers may be precluded from relief if he fails to object to a date beyond the requisite period at the time the date was set or during the remainder of the time limit. See *Scrivener v. State* (1982), Ind., 441 N.E.2d 954, 956; *Pethtel v. State* (1981), Ind.App., 427 N.E.2d 891.

Appellant claims all of his objections based on the IAD properly preserve the "120 day limit" issue for appeal. Appellant is incorrect. The relevant times when appellant should have objected were on June 27, 1983, the date the trial was set, and August 1, 1983, the date the trial was reset. However, appellant did not object at these times to the setting or resetting of the trial date beyond the requisite 120 day period. Appellant's Affidavit of Emergency on August 29, 1983, alleging the expiration of the 120 day period did not qualify as a timely objection to preserve his rights under the IAD.

II

Appellant argues that the trial court erred in refusing his tendered "circumstantial evidence" instruction.

> "Instructions upon circumstantial evidence are not required to be given where the evidence of guilt is direct and positive or where some is direct and some is circumstantial." *Hitch v. State* (1972), 259 Ind. 1, 12, 284 N.E.2d 783, 789.

Faught v. State (1979), 271 Ind. 153, 390 N.E.2d 1011, 1017.

Here, there is direct evidence that appellant negotiated the purchase of the truck for $1300, that he negotiated a $4,000 loan with the truck as collateral, that he reported the truck as stolen, and that he sold the truck's frame. The existence of this direct evidence permitted the case to be submitted to the jury without a discrete instruction on how to deal with a case resting solely upon circumstantial evidence.

III

Appellant argues that the trial court erred in giving a "greatest weight of the evidence" instruction in a criminal case. Appellant objected to the instruction at trial. He contends that the instruction is similar to a "preponderance of the evidence" instruction in a civil case and that, as a result, the instruction necessarily confused the jury as to the "proof beyond a reasonable doubt" standard.

The challenged instruction No. 12 is set forth here:

> You are the sole judges of the weight of the evidence. The evidence that has the greatest weight is that evidence which most strongly convinces you of its truthfulness. You should consider all of the facts and circumstances in evidence to determine what evidence is of the greatest weight.
>
> The weight of the evidence is not necessarily determined by the number of witnesses testifying concerning it. You may find that the testimony of a smaller number of witnesses has more strongly convinced you of its truthfulness and is therefore of the greater weight.

This instruction does not discuss the standard of proof required for conviction; it merely stresses that the truthfulness of evidence is more important than the quantity of evidence. Furthermore, we do not discern that this instruction confused the jury as to the "reasonable doubt" standard, especially in light of the other instructions the trial court submitted to the jury stating the jury must be convinced of the guilt of the defendant beyond a reasonable doubt before he can be convicted. The trial court clearly instructed the jury as to the proper standard of proof to be applied in a criminal case.

IV

Appellant argues that the trial court erred in admitting into evidence over his objection a transcript of a telephone conversation which allegedly occurred between him and an insurance company representative. He contends that the State did not lay a sufficient foundation to identify him as one of the speakers.

Identity of the declarant in a telephone conversation may be established by circumstantial evidence. *Indiana*

Union Traction v. Scribner (1911), 47 Ind.App.621, 93 N.E. 1014, *Greenberg v. Greenberg* (1921), 79 Ind.App. 218, 133 N.E. 18, See also, 79 A.L.R.3d 79.

> [If] the witness has received. . . . a telephone call out of the blue from one who identified himself as "X" this is not sufficient authentication of the call as in fact coming from X. The requisite additional proof may take the form of testimony by the witness that he is familiar with X's voice and that the caller was X. *Or authentication may be accomplished by circumstantial evidence pointing to X's identity as the caller, such as if the communication received reveals that the speaker had knowledge of facts that only X would be likely to know.*

McCormick et al. on Evid.3d HBLE, § 226.

Here, the state has proven appellant's identity as the caller circumstantially because the telephone conversation transcript reveals that the speaker had knowledge that only appellant would be likely to know i.e. his address, phone number, social security number, the details and features of the truck, and the reported theft of the truck.

V

Appellant argues that the trial court erred in not admitting into evidence on cross-examination a police report mentioned on direct examination.

On direct examination, Officer Phenice referred to a police report, and he testified about the circumstances surrounding the report as follows:

Q. Did he (Gerald Smith) also volunteer anything as to where the truck came from.

A. He did. He mentioned several names. However, I only mentioned one name in the report. I did not write notes at the time. I wrote them when I went back to the office. I did cue in on one particular name that was mentioned.

Q. Who was that?

A. It was Denver Manning.

Q. Why did you cue in on that so to speak?

A. The name Denver Manning had been in other investigations I was involved with in the Gary area. I did not know who was being particularly investigated in Trooper Rayl's case. The name Manning however was put in my reports simply because that was the name I was familiar with. I was not familiar with the other names that were mentioned.

Q. Do you remember any of the other names?

A. I do remember Scott Reed's name.

On cross-examination Officer Phenice identified his report, earlier testified to, Exhibit A, and testified that it said nothing about Scott Reed. Appellant then attempted to introduce the actual written report in order to demonstrate that it referred only to Denver Manning as a possible suspect. The State objected on the grounds that the report was superfluous in that the Officer had thoroughly testified as to its contents, and therefore, it would distract the jury.

> it is well settled that limiting the scope of cross-examination is a function within the sound discretion of the trial judge. Only upon a showing of a clear abuse of such discretion will this Court order a reversal. *Haak v. State* (1981), Ind., 417, N.E.2d 321, 322, *Cobb v. State* (1981), Ind., 412 N.E.2d 728, 739.

Wireman v. State (1982), Ind., 432 N.E.2d 1343.

Here, although the trial court refused to admit the report into evidence, appellant conducted a thorough and productive cross-examination of Officer Phenice concerning this report. Consequently, the trial court's refusal to admit the report into evidence did not substantially impinge upon appellant's right to cross-examination.

VI

Appellant argues that the trial court erred in not permitting him to cross-examine a police officer concerning the location of a confidential vehicle identification number (VIN).

On direct-examination, the trial court admitted into evidence State's Exhibit #10, a photograph of the VIN, without objection. On cross-examination, the appellant asked the police officer the following questions:

> Q. Exactly where is it (the VIN) located?
>
> A. Well, that's confidential information.
>
> Q. Well, I don't think it should be confidential in this trial.
>
> A. Well, that would be up to the judge . . .

> Court: What would the relevancy of the location be in this trial, Mr. Reed? . . .
>
> Mr. Reed: Well, If . . . uh . . . there are several Possibilities one that the man . . . there could be more than one of these numbers, for instance. It could have been altered or made quite accessible to someone else to alter it or change it. I think that it's a piece of evidence in this case . . . I should be able to cross-examine and use full knowledge about it.

The trial court then disallowed the question on the basis that there was no connection between its precise location and its possible alteration.

Appellant relies on *Burton v. State* (1984), Ind., 462 N.E.2d 207. There, only five to seven out of eleven characters of the VIN were discernible from a photograph of the VIN that the trial court admitted into evidence over defendant's objection. The defendant requested the location of the VIN in order to examine all of its characters so that he could effectively cross-examine the Officer about the VIN. The vehicle was in the custody of the police. This Court ruled that the defendant had a right to inspect the VIN on the vehicle so that he could conduct an effective cross-examination.

Here, appellant did not request to inspect the VIN on the truck, he merely wanted to know the location of the VIN. Verbal testimony at trial describing the location of the VIN, by itself, does not tend to prove or disprove that the VIN was altered; consequently, the precise location of the VIN was not then relevant, and the trial court did not prejudice appellant's right to cross-examination.

VII

Appellant argues that the trial court denied him due process of law in permitting him to represent himself without, at the same time, affording him direct access to witnesses and legal facilities.

After inquiring about appellant's decision to represent himself and after giving appellant extensive warnings about the dangers of self-representation, the court appointed stand-by counsel for appellant. The trial court also ordered that stand-by counsel should provide appellant with legal materials and be available to file necessary motions and other pleadings.

Most of the appellant's contentions concern the difficulty he had in subpoenaing and deposing witnesses. The source of his difficulty was the fact that he was incarcerated. Any problem appellant may have had would have been non-existent if he had used his stand-by counsel properly. The purpose of stand-by counsel is to lessen the barriers resulting from incarceration, and it provides a defendant with the opportunity to improve the quality of his self-representation. See *Engle v. State* (1984), Ind., 467 N.E.2d 712.

The trial court did not deny appellant due process of law.

VIII

Appellant argues that the trial court erred in admitting into evidence during the habitual offender proceeding State's Exhibits #1, #2, #3, #4, and #5.

> Certified copies of judgments or commitments containing the same or similar name as defendant's may be introduced to prove the commission of prior felonies. However, there must be other supporting evidence to identify defendant as being the same person named in the documents. *Estep v. State* (1979), 271 Ind. 525, 394 N.E.2d 111; *Smith v. State*, (1962), 243 Ind. 74, 181 N.E.2d 520.

State's Exhibit #1 consists of an information and a transcript from *State v. Orrin Scott Reed*, Cause No. 2619. The information is for "setting fire to an auto," and it reveals that the date of commission for the offense was June 24, 1951. The transcript reveals that the defendant pled guilty on April 13, 1954, that he received a one to three year sentence on April 13, 1954, and that he was 22 years of age.

State's Exhibit #2 consists of an information, a verdict form, and a pre-sentence report from *State v. Orin Scott Reed*, Cause No. 3977. The information is for grand larceny, and it reveals that the date of commission for the offense was January 14, 1959. The verdict form reveals that a jury found the defendant guilty on February 11, 1960, and that he received a one to ten year sentence on February 11, 1960. The pre-sentence report revealed the defendant's social security number as 310-30-1049, his

birth date as July 18, 1931 and other descriptive information, including a conviction for arson for which he was sentenced one to three years on April 13, 1954.

State's Witness Atchley, the Fulton County Jailer, testified that Appellant told him that his social security number was 310-30-1049. State's Witness Rayl, a state police officer, testified that he transported appellant to Fulton County from the Federal Penitentiary in Terre Haute. In addition, he testified that the penitentiary records indicated that appellant's birth date was July 18, 1931.

State's Exhibit #6 consists of appellant's driving record from the Department of Motor Vehicles. It contains appellant's social security number, 310-30-1049, Birth date, July 18, 1931, and other descriptive information.

Appellant objected to State's Exhibits #1, and #2 on the basis that the sentences had not been demonstrated and that there was no evidence demonstrating that appellant was the same person that committed the felonies described in the exhibits.

To begin with, it is clear that the sentences were proven beyond a reasonable doubt. The sentence for the 1951 felony is referred to in the transcript in State's Exhibit #1, and the sentence for the 1959 felony is referred to in the verdict form in State's Exhibit #2.

Second, there is sufficient evidence to prove beyond a reasonable doubt that appellant was the same person who committed the 1951 felony and the 1959 felony. The social security number, evidenced by the testimony of

Atchley, by a telephone conversation transcript introduced into evidence at the guilt phase of the trial, and by appellant's driving record, matches the social security number referred to in the presentence report for the 1959 felony. The birthdate, evidenced by Rayl's testimony and by appellant's driving record, matches the birth date referred to in the presentence report for the 1959 felony. Also, the description of appellant's appearance in his driving record is substantially similar to the description of his appearance in the presentence report for the 1959 felony. This is sufficient evidence to identify appellant as the perpetrator of the 1959 felony.

The presentence report for the 1959 felony mentions that appellant received a one to three year sentence for arson on April 13, 1954. This is the sentence and the sentencing date mentioned in the transcript of the 1951 felony. The offense of arson is also substantially similar, if not the equivalent, to the offense of setting fire to an auto. Also, the transcript of the 1951 felony indicates that appellant was born in 1931 or 1932. This is sufficient to identify appellant as the perpetrator at the 1951 felony. Furthermore, it should be noted that the names on the 1951 felony and 1959 felony are nearly identical to appellant's name. This tends to give evidentiary force to the argument that appellant was the perpetrator of the 1951 felony and the 1959 felony.

Because of our conclusion that the State demonstrated that appellant committed the 1951 felony and the 1959 felony, we need not address appellant's contentions concerning State's Exhibits #3, #4, and #5. Conviction and sentence affirmed.

GIVAN, C.J., and PIVARNIK, SHEPARD and DICKSON, JJ., concur.

STATE OF INDIANA)		IN THE FULTON
	) SS:	CIRCUIT COURT
COUNTY OF FULTON)		CALENDAR TERM 1988
STATE OF INDIANA, Plaintiff,	)	CAUSE NUMBERS S-82-53 S-82-55
vs.	)	
ORRIN SCOTT REED, Defendant.	)	RULING AND ORDER DENYING MOTION FOR POST CONVICTION RELIEF

The Court, having had under advisement the amended Petition For Post Conviction Relief, now finds and rules as follows:

That Petitioner-Defendant, Orrin Scott Reed, filed his Petition For Post Conviction relief August 15, 1985. That said Petition was amended June 10, 1988, and hearing thereon was held June 10, 1988, and at the close of hearing the Court took said matters under advisement. Petitioner-Defendant, Orrin Scott Reed, contended by his amended Petition for Post conviction Relief that: Reed was denied a pre-transfer hearing and deprived of the right to trial within one hundred and twenty (120) days. Reed also contends that he was denied counsel for three (3) months and as a result there was a violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Twelve and Thirteen of the Indiana Constitution. Reed also asserts he was denied due process of law and a fair trial under the Fifth and Fourteenth Amendments of

the United States Constitution as a result of the actions of the Court, the Sheriff, and existing jail conditions. Reed also contends he was denied due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and Section Twelve of the Indiana Constitution because provisions of Indiana code 35-33-10-4, Article four, were not met. Petitioner-Defendant Reed also contends he was denied effective assistance of counsel. Petitioner-Defendant Reed asserts also that his rights were violated because he was denied reasonable access to medical care while in the county jail.

The Court finds that Petitioner-Defendant Reed's contention that he was wrongfully denied a pre-transfer hearing and that because his attorney failed to set this contention forth on the appellate level, establishes his claim of ineffective assistance of appellate counsel, is without merit. The record establishes that Petitioner-Defendant Reed's attorney reasoned that the denial of a pre-transfer hearing (by federal authorities was not proper for review in the State Court on appeal. This Court agrees with Reed's attorney on this point and this Court finds that such failure to raise the issue of denial of a pre-transfer hearing by the federal authorities, when the case was taken on appeal to the Indiana Supreme Court, does not substantiate the claim of ineffective assistance of counsel. Petitioner-Defendant has asserted no other substantial reasons to support his contention that his attorney on appeal was ineffective.

On the trial level, the record establishes that Reed chose to proceed pro-se and that the Court appointed Attorney Humphrey as stand-by counsel and that Petitioner-Defendant Reed was promptly conferred with by

Attorney Humphrey after his appointment. The record also shows that only once during trial did the Petitioner-Defendant seek the help of Humphrey, and only when it appeared to Reed that he was losing his case. He then left the questioning of one witness to Attorney Humphrey. Attorney Humphrey assisted Reed in preparation for the trial by preparing Instructions for trial and preparing some subpoenas, and conferred with Reed before and during trial. This Court rules that Petitioner-Defendant Reed has failed to meet his burden to sustain his claim that he was denied the effective assistance of trial counsel or appellate counsel. Defendant-Petitioner's claim of denial of effective assistance of counsel on the trial Court level was directed against the Court and not against his trial counsel and is a separate issue from his counsel being ineffective. The issue of Petitioner-Defendant being denied effective assistance of counsel by the Court was ruled on and rejected by the Indiana Supreme court in its Opinion, 491 N.E.2d 182, in this case, and this issue is now res judicata.

This Court also finds that the Indiana Supreme Court, in its Opinion in this case filed marked April 7, 1986, and Certified May 7, 1986, reviewed the trial Court's conduct in not discharging Reed pursuant to the Interstate Agreement on Detainers Act, and reviewed the conduct of the trial Court with respect to the due process issues and in each instance the Indiana Supreme Court ruled against Petitioner-Defendant Reed on those matters; hence, those issues are res judicata by reason of the Indiana Supreme Court Opinion. The Indiana Supreme Court Opinion also disposed of the issue of trial being denied within the time limits of the IAD, by finding

Defendant Reed did not make a demand for trial within the time limits of IAD until July 26, 1983, and that on August 1, 1983, the Court conducted an extensive hearing on the IAD, but Reed did not reiterate his objection based on the time limit. The Indiana Supreme Court rejected Reed's contention that his rights were violated because he was not tried within one hundred and twenty (120) days. This issue is also res judicata by reason of the Opinion of the Indiana Supreme Court in this case.

This Court also finds that the Petitioner-Defendant Reed's claim that the Sheriff denied him access to reasonable medical care while confined in the county jail is without merit since Petitioner-Defendant Reed has also asserted on Page 5 of his Supplemental Attachment Of Facts Which Support The Grounds Set Forth (attached to the Motion For Post Conviction Relief, to-wit: "20a. That Petitioner was in great pain, under the care of a specialist and under drug medication and influence of drugs, that the noise and lack of lighting made conditions nearly impossible." Also this Court notes that Petitioner-Defendant Reed failed to raise on his appeal to the Supreme Court the alleged denial of reasonable medical care for Reed when he was confined in the Fulton County Jail, and the matter is therefore waived. Even had it not been waived by Reed's failure to raise the issue on appeal, this Court finds that Petitioner-Defendant Reed has failed to meet the burden of proof to establish that the Sheriff denied him reasonable medical care while confined in the Fulton County Jail and is not believable.

Finally, this Court finds that all of Petitioner-Defendant Reed's issues raised by the Amended Petition For Post Conviction Relief, except for the issues of whether

Reed was denied his Constitutional Rights by the State of Indiana because he did not have a pre-transfer hearing, and whether Reed was denied effective assistance of appellate counsel, and whether Reed was denied reasonable medical relief by the Sheriff while confined in the Fulton County Jail, were all resolved and are res judicata by reason of the Indiana Supreme Court decision in this case (Reed v State, 491 N.E.2d 182 [Ind. 1986]) or by reason that Petitioner failed to raise the issues on appeal and therefore they are waived. The three issues not disposed of by the Indiana Supreme Court decision have been ruled upon by this Court in this decision.

The amended Petition For Post conviction Relief is hereby denied.

ORDERED AND RULED this 26 day of August, 1988.

/s/ R. Alexis Clark
R. Alexis Clarke,
Special Judge
Fulton Circuit Court

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IN THE
COURT OF APPEALS OF INDIANA
FOURTH DISTRICT

ORRIN SCOTT REED, Appellant (Petitioner), -v- STATE OF INDIANA, Appellee (Respondent).	))))))))	No. 25A04-8903-PC-95

APPEAL FROM THE FULTON CIRCUIT COURT
The Honorable R. Alexis Clarke, Judge
Cause No.'s S-82-53 and S-82-55

MILLER, J.

MEMORANDUM DECISION

Defendant-appellant Orrin Scott Reed appeals the denial of his petition for post-conviction relief challenging his conviction for theft and habitual offender finding. He raises six issues on appeal which we consolidate and restate as follows:

I. Whether Reed's constitutional rights were violated when he did was denied a pre-transfer hearing prior to his transfer to state custody, and when he was not tried within 120 days.

II. Whether Reed was improperly denied his right to counsel.

III. Whether Reed was denied his constitutional rights to counsel and to prepare his case due to the conditions in which he was incarcerated.

IV. Whether Reed was denied effective assistance of counsel during his direct appeal.

V. Whether the post-conviction court erred in denying Reed's allegations on the basis of waiver and *res judicata*.

FACTS

On December 15, 1982, Reed was charged in Fulton County with theft and as a habitual offender. At the time the charges were filed, Reed was in federal custody at the United States Penitentiary in Terre Haute, Indiana. On March 9, 1983, pursuant to the Interstate Agreement on

Detainers (IAD)[1], Fulton County requested temporary custody of Reed from the federal penitentiary in Terre Haute. Pursuant to this agreement, Reed was transferred to Fulton County on April 27, 1983. An initial hearing on the Fulton County charges was held on May 9, 1983. At this time, Reed informed the court he wanted an attorney, but wished to lead the case himself. The court appointed Jere Humphrey as stand-by counsel. Over the next two months, Reed filed several handwritten motions seeking access to appointed counsel and/or legal materials. He also filed handwritten motions alleging violations of the IAD. A jury trial was held in October, 1983. The jury found Reed guilty of theft. The jury also found Reed to be an habitual offender. On November 14, 1983, Reed was sentenced to a four (4) year term on the theft conviction, enhanced by thirty (30) years due to the habitual offender determination. Reed's convictions and sentence were upheld on appeal. *Reed v. State* (1986), Ind., 491 N.E.2d 182. On August 15, 1985, Reed filed a *pro se* petition for post-conviction relief alleging generally, that the trial court had violated provisions of the IAD and, he was denied effective assistance of counsel. An evidentiary hearing was held on June 10, 1988. Reed was represented by Julia Casey, a Deputy Public Defender. At this hearing, Reed testified he encountered great difficulty contacting appointed counsel and preparing for his trial. He stated the difficulties he experienced were due to three factors: (1) the court denied his repeated requests for relief, (2) the sheriff restricted phone and visitor privileges, confiscated or prohibited legal material, delayed medical care

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[1] IND. CODE §35-33-10-4 (West's 1986).

and failed to deliver subpoenas and (3) conditions existed at the jail hampered his ability to prepare for trial – noise level and lack of lighting. Jere Humphrey, the attorney appointed as stand-by counsel for Reed at trial also testified at this hearing. On August 26, 1988, the post-conviction court denied Reed's petition entering the following order:

> The Court, having had under advisement the amended Petition for Post-Conviction Relief, now finds and rules as follows:
>
> That Petitioner-Defendant, Orrin Scott Reed, filed his Petition for Post-Conviction Relief August 15, 1985. That said Petition was amended June 10, 1988, and hearing thereon was held on June 10, 1988, and at the close of hearing the Court took said matters under advisement. Petitioner-Defendant, Orrin Scott Reed, contended by his amended Petition for Post-Conviction Relief that: Reed was denied a pre-transfer hearing and deprived of the right to trial within one hundred and twenty (120) days. Reed also contends that he was denied counsel for three (3) months and as a result there was a violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Twelve and Thirteen of the Indiana Constitution. Reed also asserts he was denied due process of law and a fair trial under the Fifth and Fourteenth Amendments of the United States Constitution as a result of the actions of the Court, the sheriff, and existing jail conditions. Reed also contends he was denied due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and Section Twelve of the

Indiana Constitution because provisions of Indiana Code § 35-33-10-4, Article Four, were not met. Petitioner-Defendant Reed also contends he was denied effective assistance of counsel. Petitioner-Defendant Reed asserts also that his rights were violated because he was denied reasonable access to medical care while in the county jail.

The Court finds that Petitioner-Defendant Reed's contention that he was wrongfully denied a pre-transfer hearing and that because his attorney failed to set this contention forth on the appellate level, establishes his claim of ineffective assistance of appellate counsel, is without merit. The record establishes that Petitioner-Defendant Reed's attorney reasoned that the denial of a pre-transfer hearing (by federal authorities) was not proper for review in the State Court on appeal. This Court agrees with Reed's attorney on this point and this Court finds that such failure to raise the issue of denial of a pre-transfer hearing by the federal authorities, when the case was taken on appeal to the Indiana Supreme Court, does not substantiate the claim of ineffective assistance of counsel. Petitioner-Defendant has asserted no other substantial reasons to support his contention that his attorney on appeal was ineffective.

On the trial level, the record establishes that Reed chose to proceed *pro se* and that the Court appointed Attorney Humphrey as stand-by counsel and that Petitioner-Defendant Reed was promptly conferred with by Attorney Humphrey after his appointment. The record also shows that only once during trial did the Petitioner-Defendant seek the help of Humphrey,

and only when it appeared to Reed that he was losing his case. He then left the questioning of one witness to Attorney Humphrey. Attorney Humphrey assisted Reed in preparation for the trial by preparing Instructions for trial and preparing some subpoenas, and conferred with Reed before and during trial. This Court rules that Petitioner-Defendant Reed has failed to meet his burden to sustain his claim that he was denied the effective assistance of trial cousnel [sic] or appellate counsel. Defendant-Petitioner's claim of denial of effective assistance of counsel on the trial Court level was directed against the Court and not against his trial counsel and is a separate issue from his counsel being ineffective. The issue of Petitioner-Defendant being denied effective assistance of counsel by the Court in its Opinion, 491 N.E.2d 182, in this case, and this issue is now *res judicata.*

This Court also finds that the Indiana Supreme Court, in its opinion in this case filemarked April 7, 1986, and certified May 7, 1986, reviewed the trial Court's conduct in not discharging Reed pursuant to the Interstate Agreement on Detainers Act, and reviewed the conduct of the trial Court with respect to the due process issues and in each instance the Indiana Supreme Court ruled against Petitioner-Defendant Reed on those matters; hence, those issues are *res judicata* by reason of the Indiana Supreme Court opinion. The Indiana Supreme Court opinion also disposed of the issue of trial being denied within the time limits of the IAD, by finding Defendant Reed did not make a demand for trial within the time limits of IAD until July 26, 1983, and that on August 1, 1983, the Court conducted an extensive hearing on the

IAD, but Reed did not reiterate his objection based on the time limit. The Indiana Supreme Court rejected Reed's contention that his rights were violated because he was not tried within one hundred and twenty (120) days. This issue is also *res judicata* by reason of the opinion of the Indiana Supreme Court in this case.

This Court also finds that the Petitioner-Defendant Reed's claim that the sheriff denied him access to reasonable medical care while confined in the county jail is without merit since Petitioner-Defendant Reed has also asserted on Page 5 of his Supplemental Attachment of Facts Which Support the Grounds Set Forth (attached to the Motion For Post-Conviction Relief), to-wit: "20a. That Petitioner was in great pain, under the care of a specialist and under drug medication and influence of drugs, that the noise and lack of lighting made conditions nearly impossible." Also this Court notes that Petitioner-Defendant Reed failed to raise on his appeal to the Supreme Court the alleged denial of reasonable medical care for Reed when he was confined in the Fulton County Jail, and the matter is therefore waived. Even had it not been waived by Reed's failure to raise the issue on appeal, this Court finds that Petitioner-Defendant Reed has failed to meet the burden of proof to establish that the sheriff denied him reasonable medical care while confined in the Fulton County Jail and is not believable.

Finally, this Court finds that all of Petitioner-Defendant Reed's issues raised by the Amended Petition for Post-Conviction Relief, except for the issues of whether Reed was denied his constitutional rights by the State of

Indiana because he did not have a pre-transfer hearing, and whether Reed was denied effective assistance of appellate counsel, and whether Reed was denied reasonable medical relief by the sheriff while confined in the Fulton County Jail, were all resolved and are *res judicata* by reason of the Indiana Supreme Court decision in this case *Reed v. State*, 491 N.E.2d 182 Ind. 1986 or by reason that Petitioner failed to raise the issues on appeal and therefore they are waived. The three issues not disposed of by the Indiana Supreme Court decision have been ruled upon by this Court in this decision.

The Amended Petition for Post-Conviction Relief is hereby denied.

Reed filed a Motion to Correct Errors on October 27, 1988, which the trial court denied on December 14, 1988. (Additional facts appear below where relevant.)

DECISION

Before we discuss the issues in this case, we note that, in a post-conviction proceeding, the petitioner bears the burden of proving his grounds for relief by a preponderance of the evidence. The judge who presides over the post-conviction hearing possesses exclusive authority to weigh the evidence and determine the credibility of witnesses. This court will not set aside the trial court's ruling on a post-conviction petition unless the evidence is without conflict and leads solely to a result different from that reached by the trial court. *Stewart v. State* (1988), Ind., 517 N.E.2d 1230, 1231.

ISSUE I

Reed alleges his constitutional rights were violated when he was deprived of a pre-transfer hearing and was not brought to trial within 120 days after his transfer to state court pursuant to the IAD.

Regarding Reed's claim that he was not brought to trial within 120 days after his transfer to Fulton County, the post-conviction court noted that our supreme court disposed of this issue in Reed's direct appeal and thus, this issue was *res judicata*. We agree. In *Reed, supra*, our supreme court determined that Reed had failed to preserve his rights under the IAD to be brought to trial within 120 days. As our supreme court disposed of this issue in Reed's direct appeal, he may not raise it as a ground for post-conviction relief. *See Williams v. State* (1986), Ind.App., 489 N.E.2d 594 (defendant barred by doctrine of *res judicata* from raising the issue of newly discovered evidence as ground for post-conviction relief, where the defendant had unsuccessfully raised this issue on direct appeal).

Next, Reed claims he was denied a pre-transfer hearing (by federal authorities) pursuant to Article 4 of the IAD prior to his transfer to Fulton County. Although Reed cites authority to support his position that he is entitled to a pre-transfer hearing, he does not indicate in his brief whether he objected to this IAD violation at trial. Our supreme court has held that violations of provisions of the IAD are waived unless the error is timely raised at trial. *Dotson v. State* (1984), Ind., 463 N.E.2d 266, 269. Additionally, this court has held that even though a

defendant's presence in Indiana for trial was secured without complying with the terms of the IAD, the failure to comply with the agreement did not warrant a complete dismissal of the charge or a reversal of the conviction. *Ramirez v. State*(1983), Ind.App., 455 N.E.2d 609, 614. To the extent that the authorities above do not dispose of this issue, we note Reed did not raise this error in his direct appeal, thus it is waived. *Rinard v. State* (1979), 271 Ind. 588, 394 N.E.2d 160. Reed has failed to demonstrate reversible error on this issue.

ISSUE II

Next, Reed argues he was unconstitutionally denied his right to counsel because the trial court failed to appoint counsel within a reasonable time. The record reveals that Reed was in federal custody at the United States Penitentiary in Terre Haute when charges were filed against him in Fulton County. Upon notice of these charges, Reed – who was still in federal custody – petitioned the Fulton County Court on February 23, 1983 for appointment of counsel. Reed was arrested and transported to Fulton County on April 27, 1983 and counsel was appointed at his initial hearing on May 9, 1983. We note Reed has failed to show in his brief how he was prejudiced by the court's failure to appoint counsel until May 9, 1983. Given these circumstances, we can not say Reed was unconstitutionally denied his right to counsel. Additionally, we note Reed refused counsel at his initial hearing and informed the court of his intent to proceed *pro se*. Reed has not shown reversible error on this issue.

ISSUE III

Next, Reed contends his right to due process and a fair trial were violated as a result of existing jail conditions. We note the only evidence presented on this issue at the post-conviction relief hearing was Reed's self-serving statements that he was denied access to materials and procedures necessary for trial preparation. Reed testified the sheriff confiscated legal materials, failed to deliver subpoenas and denied visits and phone calls. Reed also stated that conditions existing in the Fulton County Jail at the time of his pre-trial incarceration, specifically the noise level and the lack of proper lighting, hampered his ability to prepare for trial.

We note Reed raised a similar issue in his direct appeal and our supreme court resolved this issue against Reed stating:

> Appellant argues that the trial court denied him due process of law in permitting him to represent himself without, at the same time, affording him direct access to witnesses and legal facilities.
>
> After inquiring about appellant's decision to represent himself and after giving appellant extensive warnings about the dangers of self-representation, the court appointed stand-by counsel for appellant. The trial court also ordered that stand-by counsel should provide appellant with legal materials and be available to file necessary motions and other pleadings.
>
> Most of appellant's contentions concern the difficulty he had in subpoenaing and deposing witnesses. The source of his difficulty was the fact that he was incarcerated. Any problem

> appellant may have had would have been non-existent if he had used his stand-by counsel properly. The purpose of stand-by counsel is to lessen the barriers resulting from incarceration, and it provides a defendant with the opportunity to improve the quality of his self-representation. *See Engle v. State* (1984), Ind., 467 N.E.2d 712.
>
> The trial court did not deny appellant due process of law.
>
> *Reed, supra* at 187-188.

While our supreme court might not have disposed of this specific issue in Reed's direct appeal, the above quoted language is instructive. Much of Reed's argument concerns the difficulty he had in preparing for trial due to existing jail conditions. The source of his difficulty was generally, the fact that he was incarcerated. As our supreme court noted, any problem Reed may have had would have been non-existent if he had used his stand-by counsel properly. *Reed, supra*. We find Reed has failed to present reversible error on this issue.

ISSUE IV

Next, Reed contends he was denied effective assistance of appellate counsel because his counsel failed to raise certain issues in Reed's direct appeal, namely, that Reed was denied a pre-transfer hearing in violation of the IAD and that Reed was denied due process and a fair trial due to existing jail conditions.

To reverse a conviction for ineffective assistance of counsel a defendant must show that (1) his counsel's

errors were unreasonable and (2) these unreasonable errors prejudiced his defense. *Strickland v. Washington* (1984), 466 U.S. 668. Regarding Reed's first contention we note that Reed, appearing *pro se*, failed to object to the denial of his pre-transfer hearing at trial. Thus, Reed, by his own actions, waived this error for review, *Dotson, supra*. As such, his attorney's failure to raise this issue in Reed's direct appeal was not unreasonable. *Strickland, supra*.

Regarding Reed's second contention that his counsel failed to raise the question of the jail conditions hampering his trial preparation, we note Reed's problems were largely the result of his insistence on proceeding *pro se*. Additionally, in light of our supreme court's disposition of a similar issue in Reed's direct appeal, it is doubtful that Reed would have succeeded with respect to this contention. Reed has not shown that his attorney exercised unreasonable professional judgment in failing to raise these alleged errors on appeal. *Strickland, supra*.

Reed also claims his attorney was ineffective because he failed to adequately present the error that Reed was not brought to trial within 120 days after his transfer to Fulton County in violation of the IAD. However, our supreme court determined – in Reed's direct appeal – that Reed by his own actions, had failed to preserve his rights under the IAD to be brought to trial within 120 days. As Reed failed to preserve this error in the trial court, his attorney's failure to adequately present this error on appeal was not unreasonable. Reed has not shown reversible error on this issue.

ISSUE V

Finally, Reed complains the post-conviction court erred in applying the doctrines of waiver and *res judicata* in denying his petition for post-conviction relief. We disagree. A matter which would have been reviewable on direct appeal, but which was not raised at that time, is waived and a post-conviction court can judicially notice that such an issue has been waived. *Rinard, supra*. Additionally, a defendant may be barred by the doctrine of *res judicata* from raising an issue as grounds for post-conviction relief, where the defendant had unsuccessfully raised this issue on direct appeal. *Williams, supra*. Moreover, to the extent that the post-conviction court improperly applied these two doctrines, this court has attempted to address Reed's allegations on the merits. For the foregoing reasons, we affirm the post-conviction court's judgment.

ROBERTSON, J. and CONOVER, J. CONCURRING

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ORRIN SCOTT REED,	)	
	)	
Petitioner	)	Civil No.
	)	S 90-226
v.	)	
	)	
DICK CLARK; and INDIANA ATTORNEY GENERAL	)	
	)	
	)	
Respondents	)	

MEMORANDUM AND ORDER

On May 22, 1990, *pro se* petitioner, Orrin Scott Reed, filed a petition seeking relief under 28 U.S.C. § 2254.[1] The return filed on August 27, 1990, demonstrates the necessary compliance with *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982). Six volumes of the state court record were filed, which the court has examined pursuant to the mandates of *Townsend v. Sain*, 372 U.S. 293 (1963). The court has also examined the rebuttal filed by the petitioner on September 6, 1990. Indeed, the eighteen-page rebuttal is

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[1] Orrin Scott Reed certainly is not a stranger to the judiciary system. *See Reed v. State*, (Unpublished) 840 F.2d 920 (7th Cir. 1988); *Reed v. Morton*, (Unpublished) 808 F.2d 837 (7th Cir. 1986), *cert. denied*, 481 U.S. 1020 (1987); *United States v. Reed*, 392 F.2d 865 (7th Cir.), *cert. denied*, 393 U.S. 984 (1968); *Reed v. State*, (Unpublished) 546 N.E.2d 132 (Ind.App. 1989); *Reed v. State*, 491 N.E.2d 182 (Ind. 1986); *Reed v. Duckworth, et al.*, S 88-77; *Reed v. Duckworth*, S 86-683; *Reed v. State*, S 86-682; *Reed v. State*, S 86-444; *Reed v. Morton*, S 86-6; *Reed v. Pearson*, S 85-100; *Reed v. Rayl*, S 84-682; *Reed v. McLochlin*, S 83-423; *Reed v. United States*, S 72-139; *Reed v. United States*, S 69-117.

quite lawyerlike in both form and substance and the author is to be commended even if this court does not ultimately abide by its request.

Specifically, this court has five volumes of the record of proceedings in the Fulton Circuit Court before the Honorable Douglas B. Morton and has one volume of proceedings in the same court before the Honorable R. Alexis Clark, Special Judge.

The petitioner was convicted of theft and found to be a habitual offender. He was sentenced to a term of 34 years in prison. A direct appeal was taken to the Supreme Court of Indiana, which unanimously affirmed the aforesaid conviction in an opinion authored by Justice DeBruler and reported in *Reed v. State*, 491 N.E.2d 182 (Ind. 1986). On August 15, 1985, the petitioner filed a *pro se* petition for post-conviction relief alleging that the trial court had violated provisions of the Interstate Agreement on Detainers, and that he was denied effective assistance of counsel. On August 26, 1988, the post-conviction court denied the petition, and in an unpublished memorandum decision dated October 16, 1989, the Court of Appeals of Indiana affirmed the post-conviction court's denial. *See Reed v. State*, 546 N.E.2d 132 (Ind.App. 1989).

In the present petition, the petitioner attached a seven-page, fourteen-numbered paragraph document which is attached as Appendix "A" hereto for immediate and convenient reference. The plaintiff's petition on its face indicates that there are post-conviction proceeding [sic] pending in the state court.

However, upon examination of the opinion of Justice DeBruler in which he dealt with eight separate issues,

and paralleling the opinion to the aforesaid petition in this case, it may be presumed that the issues presented have been exhausted, since the Attorney General of Indiana does not argue otherwise. The factual setting of the case, as stated by Justice DeBruler, beginning at page 183, is as follows:

> In June, 1979, the Wabash Valley Bank foreclosed on its security interest in a 1977 Ford pick-up truck, identification number F14 SCY 89 261. Wabash Valley Bank then sold the truck to the appellate for thirteen hundred dollars in cash. In August 1979, the First National Bank of Rochester loaned M. & S. Salvage four thousand dollars; the same truck became the collateral for the loan. Appellant signed the note. The First National Bank of Rochester regarded appellant as the owner of M. & S. Salvage, and the appellant had communicated to others that he was the owner of M. & S. Salvage.
>
> On October 6, 1979, appellant reported the same truck as stolen from a K-Mart parking lot in South Bend. Auto Owner's Insurance Company paid $4,660 on the resulting loss claim. Marsha L. Reed had title to the truck and the insurance company had issued the policy in her name. Marsha Reed was actually Marsha Lee, a woman with whom appellant was living at the time. The insurance proceeds were used to pay the remaining sum of $3,101.52 to the First National Bank of Rochester on the note that appellant signed.
>
> In February 1980, state police, in executing a search warrant on the premises of M. & S. Salvage, discovered a license plate, issued to Marsha Reed for the same truck. A computer search indicated to the police that the truck had been stolen. A woman, who lived with an M. & S. Salvage employee, told the police that she saw M. & S. Salvage employees transferring parts from a blue pick-up truck to a red pick-up truck. Robert Smith, another employee, told the police that he had paid the appellant $300.00 for a frame and running gear on which he had placed his blue cab. Smith never received a certificate of title from appellant for the frame. Subsequently, Smith sold the reconstructed truck, to Shelton under the old truck's certificate of title. Police in Tennessee located Shelton's truck, and then discovered a concealed vehicle identification number on its frame. The number was F14 SCY 89 261; the same number on the frame of the truck appellant reported stolen from the K-Mart parking lot in South Bend.

Reed, 491 N.E.2d at 183-84. Justice Stewart, speaking for the Supreme Court of the United States in *Jackson v. Virginia*, 443 U.S. 307 (1979), stated:

> A judgment by a state appellate court rejecting a challenge to evidentiary sufficiency is of course entitled to deference by the federal courts, as is any judgment affirming a criminal conviction. But Congress in § 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law. The federal habeas corpus statute presumes the norm of a fair trial in the state court and adequate state postconviction remedies to redress possible error. See 28 U.S.C. § 2254(b), (d). What it does not presume is that these state proceedings will always be without error in the constitutional

> sense. The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur – reflecting as it does the belief that the "finality" of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right – is not one that can be so lightly abjured.

Id. at 323. The Supreme Court in *Jackson* held:

> We hold that in a challenge to a conviction brought under 28 U.S.C. § 2254 – if the settled procedural prerequisites for such a claim have otherwise been satisfied – the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof beyond a reasonable doubt.

Id. (footnote omitted). *See also Sumner v. Mata*, 449 U.S. 539 (1981); *Dooley v. Duckworth*, 832 F.2d 445 (7th Cir. 1987), *cert. denied*, 485 U.S. 967 (1988); *United States ex rel. Haywood v. O'Leary*, 827 F.2d 52 (7th Cir. 1987); *Bryan v. Warden, Indiana State Reformatory*, 820 F.2d 217 (7th Cir.), *cert. denied*, 484 U.S. 867 (1987); *Shepard v. Lane*, 818 F.2d 615 (7th Cir.), *cert. denied*, 484 U.S. 929 (1987); and *Perri v. Director, Department of Corrections*, 817 F.2d 448 (7th Cir.), *cert. denied*, 484 U.S. 843 (1987).

A review of the record in the light most favorable to the prosecution convinces the court that a rational trier of fact could readily have found the petitioner guilty beyond a reasonable doubt of theft.

Part II of the Justice DeBruler's opinion at page 185 deals with the issue as to the circumstantial evidence instruction. It was not an error under the law of Indiana

to refuse the petitioner's circumstantial evidence instruction and it is not a constitutional error. *See Bell v. Duckworth*, 861 F.2d 169 (7th Cir. 1988), *cert. den.*, ___ U.S. ___, 109 S.Ct. 1552 (1989). A very recent decision has pointed application. In *Williams v. Chrans*, 894 F.2d 928, 937 (7th Cir. 1990) states:

> We have jurisdiction to issue writs of habeas corpus only on the ground that the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c), 2254(a).

The second issue presented deals with the state trial court's final instruction number 12, which is dealt with in Part III of Justice DeBruler's opinion at page 185. This is a question of state law and in no sense does the giving of the same constitute reversible error. It is a fairly stock instruction that is frequently given in criminal cases in both state and federal courts.

The next issue has to do with an issue under *Faretta v. California*, 422 U.S. 806 (1975), as it pertains to the petitioner's constitutional right under the Sixth Amendment of the Constitution of the United States to represent himself. Justice DeBruler dealt with that issue in Part VII of his opinion.

The petitioner requested that he be allowed to represent himself at a pre-trial conference held on August 1, 1983. Certainly, that right is guaranteed in Justice Stewart's opinion for the majority in *Faretta, id.* In his opinion, Justice Stewart acknowledged the hard reality that most defendants who take up that adventure do themselves

more harm than good. Judge Douglas B. Morton, confronted with the very difficult proposition of a defendant in a criminal case requesting to represent himself, inquired into the petitioner's determination to represent himself, and granted said request after giving the petitioner extensive warnings about the dangers of self-representation. A copy of that portion of the state trial transcript is attached hereto and marked Appendix "B". In addition to the warnings, Judge Morton appointed Jere Humphrey, an attorney known to this court as an able and experienced lawyer, as stand-by counsel for the petitioner. Finally, Judge Morton ordered the petitioner released on bond to prepare his case approximately three (3) weeks prior to the commencement of trial.

Upon review of the record, it is clear to this court that Judge Morton certainly did what is required under *Faretta v. California*, 422 U.S. at 806. *See Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990); *Prihoda v. McCaughtry*, No. 89-3479, slip op. (7th Cir., August 14, 1990). It is absurd that the petitioner is now arguing that Judge Morton violated his constitutional rights by letting him represent himself; especially in light of the fact that the petitioner requested that he be allowed to represent himself despite Judge Morton's warnings against self-representation. As evidenced by the record, the petitioner chose to represent himself, consequently, he may not turn around and complain that the quality of his own defense amounted to a denial of "effective assistance of counsel." *Faretta*, 422 U.S. at 834, n. 46.[2]

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[2] To no one's surprise, the petitioner, being the experienced litigator that he was, finally realized that he was in over his head, and at the end of the trial, requested that the trial court allow stand-by counsel, Jere Humphrey, to completely take over his defense. (T.R. 1061).

The next contention of the petitioner is ineffective assistance of appellate counsel, pursuant to *Evitts v. Lucey*, 469 U.S. 387 (1985). In a challenge to counsel's performance on appeal, the presumption of effective assistance counsel will be overcome only when ignored issues are clearly stronger than those presented. *Mikel v. Thieret*, 887 F.2d 733, 736 (7th Cir. 189) (citing *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). The petitioner has failed to demonstrate that any issue not raised by counsel was significant in any degree, either by itself or by comparison with the issues which were argued. *Mikel v. Thieret*, 887 F.2d at 736. In post-conviction proceedings, the petitioner was represented by the state public defender's office, and it is not his province to here contend the ineffective assistance of counsel during post-conviction proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551 (1987). Accordingly, the petitioner's claim of ineffective assistance of appellate counsel must fail.

As he did in the Supreme Court under Issue I of Justice DeBruler's opinion at pages 184-85, the petitioner raises an issue with regard to his detainer. Justice DeBruler has very carefully delineated that issue. A copy of that portion of Justice DeBruler's opinion is attached hereto and marked Appendix "C".

Upon review of the record, this court concludes that a significant amount of the delay of trial is attributable to the many motions filed either by the petitioner or filed on the petitioner's behalf. Article VI(a) of the Interstate

Agreement on Detainers contains the following provision concerning the tolling of time periods:

> In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as a prisoner is unable to stand trial as determined by the court having jurisdiction of the matter.

18 U.S.C.App. III, § 2, Article VI(a). The Court of Appeals for the Seventh Circuit defines the underscored language to include "all those periods of delay occasioned by the defendant," and specifically, "the periods of delay occasioned by the . . . motions filed on behalf of the defendant . . . " *United States v. Nesbitt*, 852 F.2d 1502 (7th Cir. 1988); *United States v. Roy*, 830 F.2d 628, 634 (7th Cir. 1987). *See also United States v. Dawn*, 900 F.2d 1132 (7th Cir. 1990). Accordingly, the petitioner's argument that the respondents failed to comply with the time restrictions of the Interstate Agreement on Detainers must fail.

The petitioner also complains that the state trial court erred in (1) admitting into evidence a business record of a phone conversation of the petitioner, (2) refusing to admit into evidence a police report, (3) refusing to allow the petitioner to cross-examine the police officer as to the location of the confidential vehicle identification number, and (4) admitting into evidence certified copies of petitioner's prior convictions during the habitual offender proceedings.

Justice DeBruler dealt with the evidentiary rulings in Part IV, V, and VI of his opinion at pages 186 through 187. As a general proposition, this type of ruling is committed

to the discretion of state trial judges in criminal proceedings and generally does not rise to the level of federal constitutional error unless they constitute a pervasive undermining of the basic fairness of the proceedings. In this case, it isn't even a close question. These rulings were altogether within the framework of the law of Indiana and no constitutional error is here presented.

The petitioner also complains that the state trial court erred in admitting into evidence part of the trial certified copies of his prior convictions during the bifurcated habitual offender. He contends that there is no evidence establishing that he was the same individual identified in the records admitted. This court is well aware of the mandates of *Williams v. Duckworth*, 738 F.2d 828 (7th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985). *See also Jones v. Thieret*, 846 F.2d 457 (7th Cir. 1988). In these proceedings, it was established that the petitioner was the same individual as the one named in the records of prior conviction by reference to his social security number, birthdate, and a certified copy of driver's record and name. This court does not conceive that this evidence fails the test announced by Judge Swygert, speaking for the majority in a divided court in *Williams*, 724 F.2d at 1439. No constitutional error is presented with reference to this challenge to the habitual offender proceedings.

Lastly, the petitioner complains that he was not tried within 120 days of his arrival in Fulton County, in violation of the provisions of the Interstate Agreement on Detainers, Indiana Code § 35-33-10-4. Again, Justice DeBruler has carefully delineated the actual situation with reference to that issue in Part I of his opinion at pages 184-185. In any event, the petitioner has not made a

constitutional challenge to a timely trial under the constitutional mandates of *Barker v. Wingo*, 407 U.S. 514 (1972). Justice DeBruler has found that petitioner's trial was within the appropriate time frame under the law of Indiana, and there is nothing in the Constitution of the United States that causes a different conclusion. This conviction is neither undermined by reason of petitioner's being denied any so-called pre-transfer hearing.

This court has carefully reviewed the entirety of this case and has given special attention to the rebuttal filed on September 6, 1990. Much of the effort is simply one to reargue the merits of the case. It must be reminded that this court is not a court of direct review, but that 28 U.S.C § 2254 provides for a limited, narrow, but all important constitutional review of issues that have been exhausted under the mandates of such cases as *Rose v. Lundy*, 455 U.S. 509 (1982).

While the arguments are clearly and cogently presented in an orderly fashion, they are not convincing. Therefore, no basis is presented for the granting of a writ under 28 U.S.C. § 2254.

Writ **DENIED. IT IS SO ORDERED.**

DATED: September 21, 1990

/s/ Allen Sharpe
CHIEF JUDGE
NORTHERN DISTRICT OF
INDIANA

cc: Reed
Schoening
Order Book

Orrin Scott REED, Petitioner-Appellant,

v.

Dick CLARK, Superintendent, and Attorney General of Indiana, Respondents-Appellees.

No. 90-3264.

United States Court of Appeals,

Seventh Circuit.

Argued Dec. 9, 1992.

Decided Jan. 19, 1993.

Rehearing and Rehearing In Banc Denied April 27, 1993.

Before POSNER and EASTERBROOK, Circuit Judges, and WOOD, Jr., Senior Circuit Judge.

EASTERBROOK, Circuit Judge.

While serving time in federal prison, Orrin Scott Reed was indicted by Indiana on a charge of theft. Indiana asked the United States to deliver Reed for trial under the Interstate Agreement on Detainers. Indiana took custody of Reed on April 27, 1983. Article IV(c) of the IAD provides that "trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court . . . may grant any necessary or reasonable continuance." Indiana thus had until August 25, 1983, to put Reed on trial or extend the time for "good cause shown in open court". Article V(c) prescribes dismissal of the charges, with prejudice, as the consequence of excessive delay.

Reed's trial began on October 18, 1983. Reed consented to a postponement from the scheduled date of September 13, but even that date was beyond the 120 days the IAD allows. He was convicted and sentenced to 34 years' imprisonment as an habitual offender. The Supreme Court of Indiana affirmed, concluding that Reed (who was serving as his own counsel) should have alerted the trial judge during hearings on June 27 and August 1 at which the trial date was set and then postponed. *Reed v. State*, 491 N.E.2d 182, 185 (Ind. 1986). Had Reed reminded the judge of the 120-day limit during either of these hearings, instead of burying his demand in a flood of other documents, the court could have complied with the IAD's requirements. A collateral attack in state court foundered when the inferior courts treated the Supreme Court's decision as conclusive. Reed then turned to federal court, which did not mention the state court's reason and instead held that Reed's many motions accounted for "a significant amount of the delay" and thus established "good cause" under Article IV(c).

A federal court may grant collateral relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). That principle immediately disposes of Reed's argument that Indiana failed to comply with its own procedures for establishing his status as an habitual offender. The premise is wrong, for the Supreme Court of Indiana, whose word on questions of state law is authoritative, concluded that the state had followed its own rules. 491 N.E.2d at 188-89. But it would not matter if Indiana were out of compliance with state law. "[I]t is not the province of a federal habeas court to

reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States," *Estelle v. McGuire*, ___ U.S. ___, ___, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991). See also, e.g., *Jones v. Thieret*, 846 F.2d 457 (7th Cir. 1988). Nothing is to be gained by insisting, as Reed does, that Indiana violated the Constitution by misapplying its laws. Metamorphosing state into constitutional law is inconsistent with many decisions. E.g., *Snowden v. Hughes*, 321 U.S. 1, 8-11, 64 S.Ct. 397, 401-02, 88 L.Ed. 497 (1944); *Archie v. Racine*, 847 F.2d 1211, 1216-18 (7th Cir. 1988) (in banc).

The Interstate Agreement on Detainers also is a state law – but because it is an interstate compact, it is a law of the United States as well. *Carchman v. Nash*, 473 U.S. 716, 719, 105 S.Ct. 3401, 3403, 87 L.Ed.2d 516 (1985); *Cuyler v. Adams*, 449 U.S. 433, 438-42, 101 S.Ct. 703, 706-09, 66 L.Ed.2d 641 (1981). Recognizing that violations of federal statutes are less likely than violations of the Constitution to lead to collateral relief, see *United States v. Timmreck*, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979); *Davis v. United States*, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974); *Hill v. United States*, 368 U.S. 424, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962); *Sunal v. Large*, 332 U.S. 174, 67 S.Ct. 1588, 91 L.Ed. 1982 (1947), Reed tries to "constitutionalize" the IAD, but this maneuver works no better on the IAD than on Indiana's rules for establishing habitual-offender status. Reed contends: "[T]he IAD's mandatory language establishes a liberty interest protected by the due process clause of the Fifth and Fourteenth Amendments. The State of Indiana therefore violated Mr. Reed's

due process guarantees and his IAD right when the State failed to try him within 120 days." Yet all the IAD does is prescribe procedures: hearing before transfer, trial within 120 days of arrival, and so on. Procedures for adjudication are neither "liberty" nor "property" for constitutional purposes. *Olim v. Wakinekona*, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983). Statutes and rules establish liberty or property interests only to the extent they prescribe substantive rules of decision. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460-63, 109 S.Ct. 1904, 1908-10, 104 L.Ed.2d 506 (1989); *Wallace v. Robinson*, 940 F.2d 243 (7th Cir. 1991) (in banc); *Doe v. Milwaukee County*, 903 F.2d 499 (7th Cir. 1990). When a state does not comply with a procedure specified in a statute or rule, it has violated that statute or rule, nothing more. Reed can succeed on this collateral attack, therefore, only by persuading us to reopen a statutory question decided adversely to him by the Supreme Court of Indiana.

Although § 2254(a) permits a court to issue a writ of habeas corpus to end custody that violates laws of the United States, the Supreme Court has yet to decide when such relief is appropriate. Indeed, the Court has yet to decide whether *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed.469 (1953), which authorizes reexamination of subjects addressed by state courts, applies to claims based on federal statutes. Nothing in the text of § 2254 suggests a difference between the treatment of statutory and constitutional arguments, but the Court nonetheless has been chary of equating the two, lest collateral review become a rerun of the direct appeal. *Sunal*, *Hill*, and *Timmreck* say that statutory arguments ordinarily may not

be raised collaterally. These cases were decided under 28 U.S.C. § 2255, which applies to federal prisoners, but the language of § 2254 and § 2255 is identical in all material respects, and the Court has concluded that the two are "identical in scope". *Davis*, 417 U.S. at 343, 94 S.Ct. at 2304.

Sunal and its successors hold that there is a difference between "custody in violation of the . . . laws . . . of the United States" and a violation of those laws by the state. "To show that 'the custody' – and not simply the custodian – violates the law, the prisoner must at a minimum trace the prejudicial effect of the error." *White v. Henman*, 977 F.2d 292, 295 (7th Cir.1992). *Davis* and *Hill* call on us to search for "exceptional circumstances" amounting to "a fundamental defect which inherently results in a complete miscarriage of justice". 417 U.S. at 346, 94 S.Ct. at 2305, quoting from 368 U.S. at 428, 429, 82 S.Ct. at 471, 472. Unfortunately, such formulas rarely settle concrete disputes. What is "exceptional" depends on your point of view. Some courts have concluded that the IAD does not create a "fundamental" right and that violations rarely if ever result in a "miscarriage of justice". E.G. *Fasano v. Hall*, 615 F.2d 555 (1st Cir.1980); *Edwards v. United States*, 564 F.2d 652 (2d Cir. 1977); *Kerr v. Finkbeiner*, 757 F.2d 604 (4th Cir.1985); *Metheny v. Hamby*, 835 F.2d 672 (6th Cir.1987); *Greathouse v. United States*, 655 F.2d 1032 (10th Cir.1981); *Seymore v. Alabama*, 846 F.2d 1355 (11th Cir.1988). Others have reached a contrary conclusion, pointing to the IAD's remedy; dismissal with prejudice. Surely it is a miscarriage of justice to hold in prison a person who should have been released outright, these courts believe. *United States v. Williams*, 615 F.2d 585,

589-90 (3d Cir.1980); *Gibson v. Klevenhagen*, 777 F.2d 1056 (5th Cir.1985); *Cody v. Morris*, 623 F.2d 101 (9th Cir.1980). Controversy has developed within two of these circuits as judges debate which parts of the IAD are "fundamental" and which are not. E.g., *Cooney v. Fulcomer*, 886 F.2d 41, 44 (3d Cir.1988); *Carlson v. Hong*, 707 F.2d 367, 368 (9th Cir.1983). Our circuit has not taken a position on this subject. We have recognized that the IAD is a law of the United States without delineating the circumstances under which its violation leads to collateral relief. *Webb v. Keohane*, 804 F.2d 413 (7th Cir.1986); *Esposito v. Mintz*, 726 F.2d 371 (7th Cir.1984).

Verbal analysis of "fundamental defect" or "miscarriage of justice" or "exceptional circumstances" is unlikely to get us anywhere. The meaning of "custody in violation of the . . . laws . . . of the United States" must depend in large measure on why federal courts ever reexamine decisions reached by state courts. State courts may be hostile to federal norms, and as a practical matter the Supreme Court of the United States can review only a tiny fraction of all state decisions. Constitutional rights, insulated from popular control, are most likely to engender hostility; a majority may very much wish to do things otherwise. Statutory rights are more likely to enjoy majority support, with a correspondingly reduced need for multiple layers of judges. Some states may be out of sympathy with some federal laws, but many of these laws command overwhelming contemporary support. Consider the IAD: this is a federal law by virtue of its status as an interstate compact, but it is also a law of Indiana. We have no more reason to suppose that the Supreme Court of Indiana seeks to undermine the IAD than we

have to suppose that it seeks to undermine any other law of Indiana.

The high costs of collateral review influence the proper scope of that enterprise. See *Parke v. Raley*, ___ U.S. ___, 113 S.Ct. 517, 118 L.Ed.2d 318 (1992); *Keeney v. Tamayo-Reyes*, ___ U.S. ___, 112 S.Ct. 1715, 121 L.Ed.2d 391 (1992); *Coleman v. Thompson*, ___ U.S. ___, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); *Kuhlmann v. Wilson*, 477 U.S. 436, 444-55, 106 S.Ct. 2616, 2621-28, 91 L.Ed.2d 364 (1986) (plurality opinion); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *Mackey v. United States*, 401 U.S. 667, 682-83, 91 S.Ct. 1160, 1174-75, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring); *Taylor v. Gilmore*, 954 F.2d 441 (7th Cir.1992), cert. granted, ___ U.S. ___, 113 S.Ct. 52, 121 L.Ed.2d 22 (1992); *Brecht v. Abrahamson*, 944 F.2d 1363 (7th Cir.1991), cert. granted, ___ U.S. ___, 112 S.Ct. 2937, 119 L.Ed.2d 563 (1992). It would be otiose to recapitulate these costs, which underlie the limitations expressed in *Sunal*, *Hill*, *Davis*, and *Timmreck*. High costs may be worth bearing to prevent continuing unconstitutional custody, and in one other circumstance: when the confined person is innocent. *Davis*, the only decision of the Supreme Court ever to hold that a person was in "custody in violation of the . . . laws . . . of the United States", arose out of such a situation. After Davis had been convicted, the court of appeals held in a different case that the acts of which he had been accused did not constitute a crime. Imprisoning a person whose acts are not illegal, *Davis* concluded, creates "custody in violation of the . . . laws . . . of the

United States." *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), expresses a similar thought when holding that federal courts will review state convictions to ensure that a reasonable jury could have found the defendant guilty. Although *Jackson* borders on a search for violations of state law, see *Fagan v. Washington*, 942 F.2d 1155 (7th Cir.1991); *Bates v. McCaughtry*, 934 F.2d 99 (7th Cir.1991), it also emphasizes the special value attached to claims of innocence. See also *Kuhlmann* and, e.g., Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142 (1970); Ronald J. Allen, *Mullaney v. Wilbur, the Supreme Court and the Substantive Criminal Law – An Examination of the Limits of Legitimate Intervention*, 55 Tex.L.Rev. 269 (1977).

Stone v. Powell illustrates the limits of collateral review for errors that do not themselves violate the Constitution. Although the fourth amendment forbids unreasonable searches and seizures, it does not prescribe a remedy for violations. The exclusionary rule, devised to influence the police to respect the rights of suspects, is not constitutionally obligatory – and, *Stone* holds, will not be applied on collateral review unless the state court declines to consider the defendant's arguments. One complete round of litigation on remedial contentions is enough, the Court concluded. See also *Duckworth v. Eagan*, 492 U.S. 195, 205-14, 109 S.Ct. 2875, 2881-86, 106 L.Ed.2d 166 (1989) (O'Connor, J., concurring) (concluding that claims based on *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), should be treated in the same way); *Williams v. Withrow*, 944 F.2d 284 (6th Cir.1991), cert. granted, ___ U.S. ___, 112 S.Ct. 1664, 118 L.Ed.2d 386 (1992).

Against this background, consider some possible interpretations of "custody in violation of the . . . laws . . . of the United States." Imprisonment may be said to violate the law when:

1. Any step in the process leading to conviction violates federal law; or

2. A violation of federal law in the course of prosecution should lead to dismissal with prejudice; or

3. Compliance with the federal law would prevent conviction; or

4. The state has failed to entertain or resolve a properly raised defense based on federal law; or

5. An innocent person has been convicted.

Davis and *Jackson* hold that condition (5), innocence, requires collateral relief. See also *Kuhlmann* and, e.g., *Sawyer v. Whitley*, ___ U.S. ___, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). *Stone* adds that condition (4) also calls for collateral review. Although the Supreme Court has yet to consider condition (3), a federal law that makes it *impossible* for the state to convict a particular defendant also affords a strong foundation for relief. In such cases a state may be tempted to evade its obligations under the Supremacy Clause. Collateral review vindicates the federal interest at little cost to (legitimate) state interests – for by hypothesis the state has no entitlement to imprison the accused. But of course Reed's custody is not illegal in this sense. Compliance with the IAD would not have foreclosed his conviction. Had Indiana put Reed to trial

within 120 days of his transfer from federal prison, everything would have proceeded as it did. Reed does not contend that vital evidence fell into the prosecutor's hands (or slipped through his own fingers) between August 26 and September 19, 1983.

Only conditions (1) and (2) hold out hope for Reed. By now it should be clear that condition (1) does not support collateral review. *Sunal, Hill, Timmreck,* and *Stone* would have come out the other way if an error of federal law during the proceedings leading to conviction automatically yields "custody in violation of the . . . laws . . . of the United States." But for causation is not enough. Neither is condition (2). That dismissal with prejudice is the *remedy* for a violation tells us nothing about the question whether the federal court may inquire into the *existence* of a violation. Statutes may call for dismissal the better to induce compliance; beefing up the remedy does not imply the need for extra layers of review. Otherwise strong remedies would get stronger, and weak remedies would stay weak. Dismissal with prejudice is appropriate for both actual innocence and commencing the prosecution one day after the expiration of the statute of limitations, but only the former justifies sequential review in state and federal court. Conditions (2) and (3) examine the same subject at different times: condition (3) asks whether the federal norm makes conviction impossible *ex ante,* while condition (2) asks whether the federal norm calls for dismissal *ex post* if the state violates a federal rule. Condition (3) looks at the quality of the substantive rule, and condition (2) at the remedy. Collateral review should be used to enforce the

important substantive rules, which determine who may and may not be convicted.

All of this leads to the conclusion that *Stone v. Powell* establishes the proper framework for evaluating claims under the IAD. Accord, Note, *Federal Habeas Corpus Review of Nonconstitutional Errors: The Cognizability of Violations of the Interstate Agreement on Detainers,* 83 Colum.L.Rev. 975 (1983). Condition (4), the domain of *Stone,* is the only relevant one. The IAD does not define factual or legal guilt, so condition (5) drops out, and does not put insuperable hurdles in the way of conviction, so condition (3) also falls away. Unless a state fails to entertain and resolve claims under the IAD, collateral review is unavailable in federal court.

Indiana entertained and resolved Reed's contention that the trial began too late. It concluded that Reed had not alerted the trial judge to the potential problem either during the hearing at which the trial date was set or during the hearing at which the date was postponed. During the pretrial conference of August 1, 1983, Reed presented several arguments based on the IAD, including claims that the federal government should have held a hearing before turning him over to the state and that his treatment in Indiana fell short of the state's obligations under Art. V(d) and (h). Reed did not mention the fact that the date set for trial would fall outside the 120 days allowed by Art. IV(c). Courts often require litigants to flag important issues orally rather than bury vital (and easily addressed) problems in reams of paper, as Reed did. E.g., Fed.R.Crim.P. 30 (requiring a distinct objection to jury instructions); cf. Fed.R.Crim.P. 12(b) (a district judge may require motions to be made orally). It would

not have been difficult for the judge to advance the date of trial or make a finding on the record of good cause, either of which would have satisfied Art. IV(c). Because the subject never came up, however, the trial judge overlooked the problem. Whether or not the approach of the Supreme Court of Indiana would be an independent and adequate procedural ground in support of the judgment (Respondents have not invoked *Wainwright v. Sykes*, although they cite several state cases dealing with waiver), it shows that Indiana entertained Reed's contentions without hostility to the federal statute.

On one issue, however, the state court was silent. Reed contends that the failure of the federal Bureau of Prisons to give him a hearing before transferring custody to Indiana violates Art. IV(a) of the IAD. Silence may permit review under *Stone*. Reed relies principally on *Cuyler*, 449 U.S. at 443-50, 101 S.Ct. at 709-12, which held that Art. IV requires a hearing before one state may turn a prisoner over to another. The warden of the penitentiary at Terre Haute denied Reed's request, explaining: "It is the Bureau of Prison's [sic] position that inmates in Federal Custody are not entitled to the pre-transfer hearing that is referenced by *Cuyler v. Adams*." Transfer under Art. IV is a substitute for extradition. The opportunity for pre-transfer review permits a prisoner to ask the governor to decline the request for transfer. A prisoner in federal custody has no such avenue of relief. Reed does not point to any language in the IAD or any decision by a federal court requiring the federal government to extend the sort of opportunity that states traditionally have afforded in extradition proceedings. To create a parallel opportunity by implication would be to create a new rule

of law, which may not properly be done in collateral proceedings. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Once again, therefore, we do not address the substance of Reed's contentions.

Our opinion has addressed the arguments of Reed's appointed counsel. By a separate brief, Reed personally advances numerous additional contentions. We have considered all of these, none of which requires discussion.

AFFIRMED.

ON PETITION FOR REHEARING

Decided April 27, 1993.

Before POSNER and EASTERBROOK, Circuit Judges, and WOOD, Jr., Senior Circuit Judge.

A petition for rehearing was filed by the petitioner in this case. All of the judges on the panel voted to deny rehearing, and the petition is accordingly denied.

A judge in active service called for a vote on the suggestion of rehearing in banc, which failed to obtain a majority. Judges Cudahy and Ripple voted for rehearing in banc.

RIPPLE, Circuit Judge, dissenting from the denial of rehearing en banc.

The panel opinion in this case is a thoughtful attempt to deal with a difficult problem upon which the circuits are in disarray and upon which the Supreme Court has given little firm guidance. *See Metheny v. Hamby*, 488 U.S. 913, 109 S.Ct. 270, 102 L.Ed.2d 258 (1988) (White, J., dissenting from the denial of certiorari). As the state quite frankly points out in its reply to the petition for rehearing, this opinion sets us on a different course from that adopted by the other circuits. Indeed, the panel gives rather short shrift to the efforts of the other circuits by dismissing their approaches as "unlikely to get us anywhere." *Reed v. Clark*, 984 F.2d 209, 211 (7th Cir. 1993).

Before we add to the disarray among the circuits, the matter ought to be heard in banc. This course is especially advisable in light of the tension between this holding and the court's previous opinion in *Neville v. Cavanagh*, 611 F.2d 673 (7th Cir.1979), *cert. denied*, 446 U.S. 908, 100 S.Ct.

1834, 64 L.Ed.2d 260 (1980). In that case, this court refused, on comity grounds, to grant a habeas petition by a prisoner who unsuccessfully had argued an IAD violation before the Illinois Supreme Court in an attempt to block pending criminal charges. In denying the relief sought, this court stated:

> In light of the fact that Neville does seek to derail a pending state criminal proceeding, and that he may be acquitted at trial, we believe the district court was correct in denying the petition for a writ of habeas corpus at this time. *We note that this decision does not bar federal consideration of Neville's claim. Rather, it merely delays such consideration until "a time when federal jurisdiction will not seriously disrupt state judicial processes."*

Id. at 676 (footnotes omitted) (emphasis added). Under *Reed*, *Neville* cannot stand. Here the panel specifically holds:

> - Unless a state fails to entertain and resolve claims under the IAD, collateral review is unavailable in federal court.

Op. at 213. *Neville*, then, clearly was a case in which the state court resolved the IAD claim against the prisoner. The court did not dismiss the habeas petition on jurisdictional grounds but held that, until a trial on the merits of the underlying indictment, the federal court would delay adjudication of the habeas petition. *Neville*, 611 F.2d at 676.

Also of note in *Neville* is the dissenting opinion of Judge Cudahy. He wrote:

> It would be extraordinarily useful in the instant case for a federal court to promptly consider

> and construe this interstate detainer compact because this compact attempts to provide a *nationally uniform* method of transferring federal prisoners to state courts. Such an objective can be realized only by uniform interpretation of the compact.

Id. at 678 (Cudahy, J., dissenting) (footnotes omitted). This need for uniformity in the interpretation of an interstate compact is a consideration that receives little attention in the circuit cases. Perhaps it is a factor that ought to be weighted a great deal more heavily in determining whether a "statutory claim" is cognizable on habeas.

SUPREME COURT OF THE UNITED STATES

No. 93-5418

ORRIN S. REED,
PETITIONER,

v.

DICK CLARK, Superintendent,
Indiana State Prison, et al.,
RESPONDENT.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

November 8, 1993

No. 93-5418

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ORRIN SCOTT REED,
Petitioner,
v.
ROBERT FARLEY, Superintendent, Indiana State Prison, and PAMELA CARTER, Attorney General Of Indiana,
Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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68 pp

QUESTION PRESENTED*

The Interstate Agreement on Detainers ("the IAD"), 18 U.S.C. app., is a federal law and compact signed by forty-eight states and the federal government, which sets out the rights of individuals who are subject to trial in one jurisdiction while in the custody of another jurisdiction's correctional facilities.

The question presented is:

Whether the court of appeals erred (a) by extending the reasoning of *Stone v. Powell* to bar categorically federal habeas review of state prisoners' claims that they are being held in custody in violation of the speedy trial guarantee of the IAD, an interstate compact and a "law[ ] . . . of the United States" that safeguards the Sixth Amendment's fundamental speedy trial right; and (b) by refusing to provide this claim with collateral review based upon the same standards that it would use in collateral review of a constitutional claim.

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* Petitioner, an individual, was the only petitioner in the district court. Respondents, also individuals, were the only respondents below.

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ORRIN SCOTT REED,
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v.
ROBERT FARLEY, Superintendent, Indiana State Prison, and PAMELA CARTER, Attorney General Of Indiana,
Respondents.

BRIEF FOR PETITIONER

JUDGMENTS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit affirming the District Court's denial of a writ of habeas corpus (J.A. 199-211) and denying rehearing and rehearing in banc, with the dissent from the denial of rehearing in banc (J.A. 212-14), is reported as *Reed v. Clark*, 984 F.2d 209 (7th Cir. 1993). The opinion of the United States District Court for the Northern District of Indiana denying Petitioner a writ of habeas corpus is unreported. (J.A. 188-98.)

The decision of the Indiana Supreme Court affirming Petitioner's conviction (J.A. 152-68) is reported as *Reed v. State*, 491 N.E.2d 182 (Ind. 1986). The post-conviction decisions of the Indiana Circuit Court (J.A. 169-73) and the Indiana Appellate Court (J.A. 174-87) are unreported. The Indiana Supreme Court denied review.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals (J.A. 199-211) was entered on January 19, 1993, and a decision on a petition for rehearing and rehearing in banc was entered on April 27, 1993. The petition for writ of certiorari was filed on July 26, 1993, and granted on November 8, 1993. (J.A. 215.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions, which are set forth in the Appendix to this brief:

U.S. Constitution art. I, § 10, cl. 3;

U.S. Constitution art. VI, cl. 2;

U.S. Constitution amend. VI;

Interstate Agreement on Detainers, 18 U.S.C. app.;

28 U.S.C. § 2241;

28 U.S.C. § 2254; and

28 U.S.C. § 2255.

STATEMENT OF THE CASE

A. Statement of Facts

1. Events Prior to Petitioner's Transfer To Fulton County.

Orrin Scott Reed ("Petitioner") is a sixty-two-year-old man who in 1979 was working as an interstate truck driver based in Rochester, Indiana. (R. 958, 968-69, 1230.)[1] On November 12,

[1] The following abbreviations will be used in this brief:

"App." for the Appendix of the Petitioner bound with this brief;

"J.A." for the Joint Appendix;

"R." for the state trial court proceedings and "R.P.C." for the state post-conviction proceedings.

1979, an auto insurance claim was filed on a pickup truck belonging to Marsha Lee, then Petitioner's common-law wife. (R. 24, 631-33.) As a result of the claim, Ms. Lee received $4,666 in insurance proceeds, $3,101.52 of which was used to satisfy a loan for which the pickup truck was collateral. (R. 582, 631.) A few months later, on April 9, 1980, Petitioner was arrested by federal authorities on charges (unrelated to the insurance claim) of transporting stolen goods and conspiracy. (R. 258.) He was convicted, and sentenced to serve a five year term in a federal penitentiary. (R. 260.)

In March 1981, while Petitioner was in federal custody, police discovered Ms. Lee's pickup in the possession of Larry Shelton. (R. 21.) Mr. Shelton claimed to have purchased the pickup from a Robert Smith. (R. 22.) Mr. Smith in turn claimed that he had purchased the pickup from Petitioner in the summer of 1979. (R. 22-23.)

After the police investigation was completed, the State of Indiana did nothing with its results for over a year. (R. 852.) Then, on December 15, 1982, the State charged Petitioner in the Circuit Court of Fulton County with the theft of $4,666, and with being a habitual offender. (R. 15, 25.) On the same day, that court issued a bench warrant for Petitioner's arrest. (R. 11-12, 18.)

On January 24, 1983, the State sent the federal warden a letter by which it lodged a detainer against Petitioner under the Interstate Agreement on Detainers (the "IAD"). (R. 1219.) In that letter, the State informed the warden that it shortly would be sending him a "request for temporary custody." (R. 1219.)

The federal warden informed Petitioner of the detainer on January 26, 1983. (R. 1220-21.) At that time, Petitioner was about to become eligible to serve the remaining months of his sentence in a community correctional facility, *i.e.*, a halfway house. (J.A. 11-12; R. 53, 261, 353.)

As stated in its letter of January 24, the State sent a "Request for Temporary Custody" to the federal prison authorities on March 3, 1983. (J.A. 4-6.) The Request sought the transfer of Petitioner from federal custody to Fulton County to stand trial on the state theft charge. (J.A. 5.) By signing the Request, the State agreed to try Petitioner within the IAD's 120-day mandatory trial period:

> I propose to bring this person to trial on this [information] within the time specified in Article IV(c) of the [IAD].

(J.A. 5.) Article IV(c) of the IAD requires that trial must commence "within one hundred and twenty days of the arrival of the prisoner in the receiving State." Art. IV(c), 18 U.S.C. app. § 2. If this requirement is not followed, the charge must be dismissed with prejudice. Art. V(c), 18 U.S.C. app. § 2.

As part of the Request, the Fulton County Circuit Court was required to, and did, sign and certify that "the facts recited in this request for temporary custody are correct and . . . I hereby transmit it for action in accordance with its terms and the provisions of the Agreement on Detainers." (J.A. 5-6.) Hence, the trial court was on notice of the applicability and terms of the IAD.

2. Petitioner's Transfer To Fulton County.

The State of Indiana took Petitioner into its custody on April 27, 1983. (R. 32.) This started the IAD's 120-day speedy trial period, which required the State to bring Petitioner to trial by August 25, 1983.

On May 9, 1983, after being in custody for two weeks, Petitioner appeared before the trial court for the first time. He was not represented by an attorney. Petitioner informed the trial court that he would be in a federal halfway house but for the detainer. (J.A. 12.) The court acknowledged there is "a world of difference" between a halfway house and the Fulton County Jail. (J.A. 14.)

At this hearing, Petitioner informed the court that he preferred to represent himself with the assistance of a court-appointed lawyer. (R. 329.) The court contacted and appointed Jere Humphrey, an attorney in a neighboring county, to assist Petitioner. (J.A. 13, 22.) After an initial interview on the following day, May 11, Petitioner was unable to reach Mr. Humphrey for more than a month. (J.A. 25; R.P.C. 146.) At the same time, Petitioner had access to only very limited legal materials in the Fulton County Jail. (J.A. 37.)

On June 27, 1983, the trial court held a pretrial conference. At the conference, Petitioner stated that he had tried for approximately five weeks to get in touch with Mr. Humphrey. (J.A. 25.) When Mr. Humphrey had finally contacted Petitioner, it was to inform Petitioner that he would not be at the pretrial conference because he would be on vacation. (*Id.*) Acting on his own behalf, Petitioner asked for dismissal of the Indiana charges, asserting certain violations of the IAD not at issue here. (J.A. 28-31.) The trial court took these IAD matters under advisement. (J.A. 35-36, 41.) Toward the conclusion of this June 27 pretrial conference, the court set a trial date of September 13, 1983, which was nineteen days beyond the IAD's 120-day limit. (J.A. 36.) Petitioner asked whether the court would prefer that he make future motions orally or in writing. The court responded "I want it in writing" and "I read better than I listen." (J.A. 39-40; *see also* J.A. 123 (noting preference for written motions).)

On July 15, 1983, the trial court issued a written order denying Petitioner's pending IAD motions. (J.A. 51-55.) At the same time, however, the trial court acknowledged that Petitioner was incapable of preparing or presenting his defense from his prison cell:

> It has become apparent to the Court through pretrial proceedings this far held, that the defendant will be incapable of presenting the kind of defense which he has contemplated to date, because of his incarceration.

(J.A. 54.)

On July 26, 1983, thirty-one days before the 120-day period expired, Petitioner, still acting on his own behalf, filed a motion requesting that "trial be held within the legal guidelines of the Agreement on Detainers . . . ." (J.A. 56.) Petitioner also asserted in this motion that the State of Indiana was "forcing [him] to be tried beyond the limits as set forth in the Agreement on Detainer Act." (*Id.*) Further, this motion specifically "requests no extension of time be granted beyond those guidelines." (*Id.*) On July 29, 1983, twenty-eight days before the 120-day period expired, Petitioner again specifically stated in a motion that there was "limited time left for trial within the laws." (J.A. 88.) Notwithstanding these motions, on August 1, 1983, the court moved the September 13 trial date back to September 19 to accommodate the court's schedule. (J.A. 81, 86.)

On August 1, 1983, the trial court also ordered the sheriff to provide Petitioner with access to legal materials. (J.A. 85.) Petitioner received a book on Indiana court procedure and a basic criminal law text book on August 9, 1983. (J.A. 83, 90.) With access to legal publications, Petitioner's motions became more specific. On August 10, Petitioner filed a motion for subpoenas that referenced Indiana rules. (J.A. 90.) In that motion, Petitioner asked for prompt relief, because the "Detainer Act time limits" were "approaching." (J.A. 91.)

On August 29, 1983, four days after the 120-day period had expired, Petitioner filed a "Petition for Discharge" seeking dismissal of the charges against him on the basis that he was not tried within 120 days. (J.A. 94-96.)

Two weeks later, at a hearing on September 13, 1983, Petitioner addressed the basic points that he made in his written motion. (J.A. 106-10.) Petitioner argued that both the prosecuting attorney and the trial court had signed the Request For Temporary Custody in which they agreed to abide by the IAD requirements. (J.A. 107.) Furthermore, Petitioner noted that he

had informed the trial court in his July 26 motion of its IAD responsibilities. (J.A. 109.) The State responded to Petitioner's presentation by arguing that Petitioner's sole recourse was to seek exclusion of evidence obtained because of the IAD violation. After conceding that "we may not have followed [the IAD requirements]," the State asserted that "the Court . . . may grant any necessary or reasonable continuance. It's not a very strict standard . . . ." (J.A. 112-13.)

Despite having signed the Request for Temporary Custody in which it certified compliance with the IAD, the trial court stated: "Today is the first day I was aware that there was a 120 day limitation on the Detainer Act." (J.A. 113.) After acknowledging that "there has been [from Mr. Reed] a request for moving the trial forward" and "an urging that [the trial] be done within the [IAD] guidelines that have been set out," the court stated that it was going to deny Petitioner's dismissal motion based on the Court's belief that there had not been a speedy trial request filed, the State's rationale, and the lack of any showing that dismissal was the appropriate remedy. (J.A. 113-14.) The court's written order denied the motion without explanation. (J.A. 125.)

B. Proceedings and Disposition Below.

Petitioner's trial commenced on October 18, 1993. (J.A. 148.)[2] Although Petitioner examined most of his own witnesses, he allowed Mr. Humphrey to represent him by the end of the trial.

[2] The trial was scheduled to begin on September 19, 1983. Shortly before that date, however, the local newspaper published an article that described Petitioner's prior criminal record, which was to be excluded from the theft trial based on Petitioner's successful motion in limine. (J.A. 132-33.) The article also listed the names of all the citizens that had been called for possible jury duty. (J.A. 133, 144.) On the court's own motion, the trial was postponed. Petitioner and the State consented to this postponement from a date that already exceeded the 120-day time limit. (J.A. 134, 142.) Petitioner was released on bond on September 28, 1983. (J.A. 148.)

(J.A. 149.)[3] On October 22, 1983, a jury found Petitioner guilty of theft in the amount of $4,666. (J.A. 150.) The same jury also determined that Petitioner was a habitual offender under Indiana law. (J.A. 150.) On November 14, 1983, the trial court sentenced the then 52-year-old Petitioner to four years in prison on the theft conviction, and to thirty years in prison on the habitual offender conviction. The sentences run consecutively, making it likely, as Petitioner noted, that he will "die in a prison." (J.A. 17; R. 300.)

Mr. Humphrey filed a post-trial motion challenging the conviction on the ground that the trial had violated Petitioner's IAD speedy trial right. (R. 310-12.) On January 26, 1984, the trial court denied the post-trial motion. (R. 318.) On direct appeal to the Indiana Supreme Court, Mr. Humphrey argued, *inter alia*, that the conviction should be reversed because the State failed to bring Petitioner to trial within 120 days of his transfer from federal to state custody, as required by the IAD.

On April 7, 1986, the Indiana Supreme Court affirmed Petitioner's conviction. (J.A. 152-68.) The Court rejected Petitioner's claim that the State had violated his speedy trial rights under the IAD even though the State did not bring Petitioner to trial within the 120 days required under the IAD. (J.A. 156-57.) The Court acknowledged that Petitioner made "a general demand that trial be held within the time limits of the IAD" on July 26, 1983, but held that Petitioner was required to object to the untimely trial date "at the time the date was set or during the remainder of the time limit." (J.A. 157.) According to the Indiana Supreme Court,

[3] In his attempt to defend against what the prosecuting attorney recognized as a largely circumstantial case (R. 1116), Petitioner argued that Marsha Lee and Denver Manning conspired to file the false insurance claim while Petitioner was travelling in connection with his trucking business. (R. 557-1092.) Petitioner showed that the insurance check was endorsed by Ms. Lee and not by him, and that the insurance adjuster never met with Petitioner before paying the claim. (R. 655.) Petitioner also presented evidence that he had no monetary problems that would warrant his filing of a false insurance claim. (R. 963, 971, 981, 988-89.)

there were only two occasions on which Petitioner properly could have objected: on June 27, 1983, when the original trial date was set, or on August 1, 1983, when the trial date was reset. (J.A. 157.) The Court did not address Petitioner's three written motions filed on July 26, July 29, and August 10—all before the expiration of the 120-day limit.[4]

Petitioner filed his petition for a writ of habeas corpus in the United States District Court for the Northern District of Indiana on May 22, 1990. (J.A. 188.) Proceeding *pro se*, Petitioner argued, *inter alia*, that his rights under the IAD, and under the Fifth and Fourteenth Amendments to the U.S. Constitution, were violated when the State failed to bring him to trial within 120 days of his transfer from the federal penitentiary to Fulton County Jail.

On September 21, 1990, the district court issued an opinion denying Petitioner's habeas corpus petition on the merits. (J.A. 188-98.) The court ruled that various pretrial motions filed by Petitioner made him "unable to stand trial" and thus tolled the 120-day limit established in the IAD. (J.A. 195-96.) In addition, the district court ruled that Petitioner's speedy trial claim did not rise to the level of a constitutional challenge. (J.A. 197-98.)

Petitioner, acting *pro se*, filed a timely notice of appeal from the district court's decision on September 26, 1990, and the district court issued a certificate of probable cause for appeal on September 28, 1990. After briefs and argument from appointed counsel, the court of appeals affirmed the denial of the writ without considering the merits of Petitioner's IAD claim. (J.A. 199-211.) The court of appeals began by stating that it was rejecting all of the various approaches taken by other circuits for reviewing state court decisions on IAD violations. (J.A. 203-05.) Instead, the court of appeals held, citing *Stone v. Powell*, 428 U.S. 465 (1976),

[4] Petitioner also filed for post-conviction relief in the Indiana courts, in which he sought relief for the violation of his IAD speedy trial right. This relief was denied, and he exhausted all appeals by April 30, 1990. (J.A. 169-87.)

that collateral review of claims under the IAD was unavailable unless the state court had declined to consider the defendant's arguments. (J.A. 209.)

A petition for rehearing was denied; two judges voted for rehearing in banc. (J.A. 212-14.) One judge filed an opinion dissenting from the denial of rehearing in banc, noting that the case dealt "with a difficult problem upon which the circuits are in disarray and upon which the Supreme Court has given little firm guidance." (J.A. 212.) The dissent also noted that the disarray among the circuits defeated the IAD's purpose of having a national uniform method of transferring federal prisoners to be tried in state courts. (J.A. 214.)

Petitioner filed a petition for a writ of certiorari on July 26, 1993, and for permission to proceed *in forma pauperis*. This Court granted the petition and gave permission to proceed *in forma pauperis* on November 8, 1993. (J.A. 215.)

SUMMARY OF ARGUMENT

I.

The court of appeals erred in applying the rule announced by this Court in *Stone v. Powell*, 428 U.S. 465 (1976), to preclude federal collateral review of state prisoners' claims based on violations of the speedy trial guarantee of the Interstate Agreement on Detainers ("IAD"). This Court consistently has refused to extend *Stone* beyond the limited context of Fourth Amendment exclusionary rule violations. Moreover, the considerations underlying *Stone* are not present when state prisoners assert IAD speedy trial rights in habeas proceedings. Unlike the Fourth Amendment exclusionary rule, which this Court designed to deter future constitutional violations by the State, Congress enacted the IAD to safeguard the fundamental Sixth Amendment speedy trial right of prisoners transferred under the IAD. Also unlike the exclusionary rule, which often works to exclude reliable evidence, the

IAD enhances the soundness of the criminal process by requiring prompt adjudication before evidence goes stale. Finally, the federalism and comity concerns emphasized in *Stone* are absent when state prisoners assert IAD violations in habeas proceedings because the IAD is an interstate compact in which the states are voluntary participants. By entering into the compact, the states specifically agreed to abide by the IAD's provisions, including Congress's express direction that "all courts . . . of the United States" shall enforce the IAD's provisions.

II.

Federal habeas courts should review IAD speedy trial violations under 28 U.S.C. § 2254 ("section 2254") in the same way and under the same standards as they review constitutional violations under section 2254. Because the IAD's speedy trial guarantee safeguards a constitutional right, a state prisoner who asserts an IAD speedy trial violation asserts a claim of constitutional dimension. In addition, federal habeas courts have both a statutory duty under the express terms of the IAD and a constitutional duty under the Compact and Supremacy clauses of the United States Constitution to review fully whether a state has violated the IAD. Full federal collateral review is essential to ensure that the compact is uniformly interpreted. Indeed, in *Carchman v. Nash*, 473 U.S. 716 (1985), this Court implicitly recognized that violations of the IAD's speedy trial guarantee should be reviewed under section 2254 in the same manner as constitutional violations.

III.

The plain language of the IAD required dismissal of the charges against Petitioner. The state courts and the district court failed to enforce the IAD's unambiguous provisions. As a result, Petitioner is held in custody in violation of one of the "laws . . . of the United States," and a writ of habeas corpus should issue.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN APPLYING *STONE v. POWELL* TO PRECLUDE FEDERAL HABEAS CORPUS REVIEW OF PETITIONER'S CLAIM THAT THE STATE COURT VIOLATED THE IAD'S GUARANTEE OF A SPEEDY TRIAL.

This case should have involved the straightforward application of the Interstate Agreement on Detainers (the "IAD"), a federal law and an interstate compact, 18 U.S.C. app. §§ 1-9, to essentially uncontested facts. The plain language of the IAD required the State of Indiana to try Petitioner within 120 days after his transfer from federal custody to Indiana custody. Art. IV(c), 18 U.S.C. app. § 2. It did not. The IAD permits extension of this period only upon "good cause shown in open court." *Id.* No such extension was requested or granted. The plain language of the IAD also required that, if Indiana failed to meet the IAD's 120-day speedy trial time limit, Indiana was to dismiss its charges against Petitioner with prejudice. Art. V(c), 18 U.S.C. app. § 2. It did not. The IAD further directs that "[a]ll courts . . . of the United States . . . are hereby directed to enforce the agreement on detainers." 18 U.S.C. app. § 5. Petitioner sought this enforcement in federal court. It was denied.

The court of appeals held that Petitioner was barred altogether from seeking habeas review of the IAD speedy trial violation under the rule announced by this Court in *Stone v. Powell*, 428 U.S. 465 (1976). In so holding, the court of appeals failed to analyze the unbroken line of decisions from this Court refusing to expand *Stone* beyond the limited context of the Fourth Amendment exclusionary rule. *See, e.g.*, *Withrow v. Williams*, 113 S. Ct. 1745 (1993);[5] *Kimmelman v. Morrison*, 477 U.S. 365

[5] Apparently believing that this Court would reach the opposite conclusion in *Withrow*, the court of appeals cited the grant of certiorari in *Withrow* in support of its ruling that *Stone* should be extended to preclude habeas review of IAD speedy trial violations. (J.A. 206.) Although this Court issued its decision in *Withrow* while the petition for rehearing was pending below, the court of appeals did not alter its opinion upon rehearing.

(1986); *Rose v. Mitchell*, 443 U.S. 545 (1979); *Jackson v. Virginia*, 443 U.S. 307 (1979). The court of appeals also overlooked: (1) the *Stone* Court's statement that its holding addressed the particular nature of the Fourth Amendment exclusionary rule rather than the scope of habeas corpus review generally; (2) Congress's express mandate that all federal courts "are directed to enforce" the provisions of the IAD, 18 U.S.C. app. § 5; and (3) the fact that Indiana signed the IAD, an interstate compact, which mitigates the considerations of federalism and comity underlying *Stone*'s limitations on federal habeas review.

A. This Court Consistently Has Refused To Extend *Stone* Beyond Claims Brought Under The Fourth Amendment Exclusionary Rule.

In *Stone v. Powell*, this Court held that federal habeas review of a purported violation of the Fourth Amendment exclusionary rule is available only when the state court has failed to grant a full and fair opportunity to litigate that claim. 428 U.S. 465, 494 (1976). The *Stone* Court made clear that its "decision [did] not mean that the federal court lacks jurisdiction over such a claim." *Id.* at 494-95 n.37. Rather, *Stone* rested on prudential grounds arising out of the singular nature of the exclusionary rule itself. As the Court noted, the exclusionary rule (as distinguished from the Fourth Amendment rights whose violation it is intended to deter) is not a "personal constitutional right" and is not "calculated to redress the injury to the privacy of the victim of the search or seizure." *Id.* at 486. Rather, that rule " 'is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . .' " *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). The exclusionary rule is not designed to stop a specific violation from occurring, or even to redress the injury that flows from a violation of the

Fourth Amendment, because "any '[r]eparation comes too late.' " *Id.* (quoting *Linkletter v. Walker*, 381 U.S. 618, 637 (1965)).

In deciding *Stone*, this Court "carefully limited the reach of its opinion." *Rose v. Mitchell*, 443 U.S. 545, 560 (1979). The *Stone* Court recognized that "Fourth Amendment violations are different in kind from denials of Fifth or Sixth Amendment rights." 428 U.S. at 479-82. Further, the Court's opinion rejected as "misdirected hyperbole" the dissent's concern that *Stone* lays a groundwork for the withdrawal of federal habeas jurisdiction for, among other things, violations of the right to a speedy trial. *Id.* at 494-95 n.37 (addressing dissent of Brennan, J., *id.* at 518 n.13). The Court emphasized that its ruling "is *not* concerned with the scope of the habeas corpus statute" but is based on the fact that the exclusionary rule is a judicially created right whose utility is minimal when applied in a habeas proceeding. *Id.* at 494-95 n.37 (Court's emphasis).

This Court repeatedly has refused to extend the reasoning of *Stone v. Powell* beyond the collateral review of Fourth Amendment exclusionary rule violations. *See Withrow v. Williams*, 113 S. Ct. 1745 (1993) (declining to extend *Stone* to *Miranda* claims); *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (declining to extend *Stone* to Sixth Amendment ineffective assistance of counsel claims); *Rose v. Mitchell*, 443 U.S. 545 (1979) (declining to extend *Stone* to equal protection claims); *Jackson v. Virginia*, 443 U.S. 307 (1979) (declining to extend *Stone* to due process claims under the Fourteenth Amendment).

These cases demonstrate that this Court should exercise extreme caution before extending the ruling in *Stone*:

> [D]ecisions concerning the availability of habeas relief warrant restraint. Nowhere is the Court's restraint more evident than when it is asked to exclude a substantive category of issues from relitigation on habeas.

Withrow, 113 S. Ct. at 1758 (O'Connor, J., concurring in part, dissenting in part).[6]

B. The Considerations That Led To The Ruling In *Stone* Do Not Warrant Barring IAD Speedy Trial Claims From Federal Habeas Corpus.

1. The IAD Speedy Trial Guarantee Is A Personal Trial Right That Congress Provided To Protect The Fundamental Sixth Amendment Speedy Trial Right; The Remedy For Its Violation Is Calculated To Prevent A Tardy Trial Or Redress A Violation If A Tardy Trial Is Conducted.

"[T]he right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967). Indeed, the "history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution." *Id.* at 226. Unlike the judicially-created exclusionary rule at issue in *Stone*, the IAD speedy trial guarantee is a fundamental personal right enacted by Congress to safeguard individuals' Sixth Amendment speedy trial rights.

The most serious problem that the speedy trial right is intended to prevent is " 'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." *Doggett v. United States*, 112 S. Ct. 2686, 2692 (1992) (quoting *Barker v. Wingo*, 407 U.S. 514, 532 (1972)). The speedy trial right assures that a defendant will be able to obtain exculpatory evidence without facing the risk that "witnesses [will have] die[d], disappear[ed]," or "are unable to recall accurately events of the distant past." *Barker*, 407 U.S. at 532. This problem is most serious, "because the inability of a defendant adequately to

[6] No other court of appeals has applied the rationale of *Stone* in deciding whether to accord habeas review to alleged violations of the IAD since *Stone* was decided seventeen years ago. Indeed, the State of Indiana did not advance this argument below, and it was not briefed to the court of appeals.

prepare his case skews the fairness of the entire system." *Doggett*, 112 S. Ct. at 2692 (quoting *Barker*, 407 U.S. at 532).[7] Further, this Court has expressly recognized that the sole remedy for violation of the speedy trial right is dismissal of the charges. *Strunk v. United States*, 412 U.S. 434, 439-40 (1973); *Barker*, 407 U.S. at 522.

This Court has recognized specifically the importance of the speedy trial right to persons already incarcerated on unrelated charges. *Moore v. Arizona*, 414 U.S. 25, 27 (1973) (recognizing the cognizability of speedy trial claim even though petitioner already was incarcerated in another state on other charges); *Strunk*, 412 U S. at 439 (speedy trial guaranteed even for confined persons); *Dickey v. Florida*, 398 U.S. 30, 36-38 (1970) (same); *Smith v. Hooey*, 393 U.S. 374, 378-79 (1969) (same). In *Smith*, this Court held that "delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is held without bail upon an untried charge." 393 U.S. at 378.

Specifically, *Smith* held that the most important concern of the speedy trial right — the possibility that the defense will be impaired — is "markedly increased when the accused is incarcerated in another jurisdiction." 393 U.S. at 379. The *Smith* Court explained that an incarcerated defendant loses the "ability to confer with potential defense witnesses, or even to keep track of their whereabouts." *Id.* at 379-80. While all defendants subject to delayed trials are prejudiced by evidence disappearing and memories fading, the Court concluded, "a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time." *Id.* at 380.[8]

[7] The right to a speedy trial also is designed to prevent the harm from oppressive pretrial incarceration, to minimize anxiety and concern, and to minimize the risk of public scorn, disruption of one's life, and chilled speech. *See, e.g.*, *Barker*, 407 U.S. at 532.

[8] *Smith* noted several other ways in which prisoners are harmed by delay in bringing them to trial on pending charges, including the loss of the possibility of obtaining concurrent sentences, denial of clemency, pardon, and parole, and denial of participation in rehabilitative programs. 393 U.S. at 378 & n.11. *Smith* also held that anxiety from an untried charge "can have fully as depressive an effect upon a prisoner as upon a person who is at large." 393 U.S. at 379.

One of the primary purposes of the IAD was to protect the constitutional speedy trial right. Congress adopted the IAD in response to this Court's conclusion in *Smith v. Hooey*, 393 U.S. 374 (1969), and *Dickey v. Florida*, 398 U.S. 30 (1970), that incarcerated individuals retain the constitutional right to a speedy trial on all outstanding charges.

In Article I of the IAD, Congress found that legislative action was merited by "difficulties in securing speedy trial of persons already incarcerated in other jurisdictions." Art. I, 18 U.S.C. app. § 2; *see also* Art. V(a), *id.* (requiring states to deliver prisoners so that "speedy and efficient prosecution may be had"). Articles IV(c) and V(c) require that signatory states bring defendants to trial within 120 days of receiving custody or dismiss the charges with prejudice. *Id.* Thus, the IAD signatories agreed to be bound to commence their trials within specific periods of time—an agreement that this Court has recognized as entirely appropriate. *See Barker*, 407 U.S. at 523 (noting the difficulty for courts to prescribe a specific number of days after which the speedy trial right is violated). The signatories also agreed that the remedy for failure to adhere to the speedy trial provision must be dismissal—the remedy that this Court has recognized as the only possible remedy for such a violation. *Barker*, 407 U.S. at 523.

The Senate Report verifies that Congress passed the IAD to protect the speedy trial rights of already incarcerated individuals:

> [I]n *Smith v. Hooey* . . . the Supreme Court ruled that a prisoner charged with a State offense has a right to speedy trial and that the State is under an obligation to make a diligent, good faith effort to bring a defendant to trial within a reasonable time, even when he is serv-

> ing a sentence in a Federal prison outside the State involved.
>
> More recently, the Supreme Court of the United States ruled on May 25, 1970, in the case of *Dickey v. Florida* . . . , that a criminal conviction . . . must be vacated because the State had failed to bring the defendant to trial for a period of over 7 years on account of his detention during that time in a Federal penitentiary.
>
> The committee is of the opinion that the enactment of this legislation would afford defendants in criminal cases the right to a speedy trial and diminish the possibility of convictions being vacated or reversed because of a denial of this right.

S. Rep. No. 1356, 91st Cong., 2d Sess. at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4864; *see also* H.R. Rep. No. 1018, 91st Cong., 2d Sess. at 1-2 (1970); 116 Cong. Rec. H14000 (1970) (remarks of Rep. Poff); *id.* at S38840 (remarks of Sen. Hruska). Based on the language of the IAD and its legislative history, this Court concluded in *Carchman v. Nash* that a chief purpose of the IAD is to prevent violations of the speedy trial right: "Congress . . . enacted the Agreement in part to vindicate a prisoner's constitutional right to a speedy trial." 473 U.S. at 731 n.10; *see also Cuyler v. Adams*, 449 U.S. 433, 435 n.1 (1981) (the IAD established "procedures that ensure protection of the prisoner's speedy trial rights"). Thus, unlike the judicially-created exclusionary rule, Congress enacted the IAD to protect a fundamental personal right, and to remedy a violation of that right.

This Court's recent decision in *Withrow v. Williams*, 113 S. Ct. 1745 (1993), confirms the importance of this distinction. In *Withrow*, 113 S. Ct. at 1751, this Court affirmed the lower courts' refusal to extend *Stone* to bar habeas review of violations of *Miranda v. Arizona*, 384 U.S. 436 (1966). This Court based its ruling in part on its conclusion that the *Miranda* safeguards differed from the Fourth Amendment exclusionary rule. The *Withrow* Court observed that the Fourth Amendment exclusionary rule "is

not a personal constitutional right" because it is not designed to address the constitutional rights of the person who invokes the rule. 113 S. Ct. at 1753. In contrast, *Withrow* holds, the safeguards of *Miranda* are designed to address the constitutional rights of the person who invokes it. *Id.* at 1752-53.[9]

The *Withrow* Court further distinguished *Stone* on the basis that whereas the Fourth Amendment exclusionary rule does not safeguard a trial right, "*Miranda* safeguards 'a fundamental *trial* right.' " 113 S. Ct. at 1753 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)) (*Withrow* Court's emphasis). In other words, this Court reasoned that while a defendant's assertion of the exclusionary rule at trial cannot prevent a violation of the Fourth Amendment (that violation occurred at the time of the improper search or seizure), a defendant can assert *Miranda* at trial to prevent a violation of the Fifth Amendment, which would occur if he were "compelled in any criminal case to be a witness against himself."

Unlike the exclusionary rule, but just like *Miranda*, the IAD's speedy trial guarantee is "personal" in that its purpose and effect are to protect the constitutional rights of the person who invokes the right. Also like *Miranda*, the IAD speedy trial guarantee is a "trial right" in that it permits an individual to invoke the right at (or before) trial to prevent its violation. Consequently, this Court should refuse to extend *Stone* to bar categorically habeas relief for violations of the IAD speedy trial guarantee.[10]

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[9] *See also Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986) ("In contrast to the habeas petitioner in *Stone*, who sought merely to avail himself of the exclusionary rule, Morrison seeks direct federal habeas protection of his personal right to effective assistance of counsel.").

[10] Violation of the right to a speedy trial is not mere "trial error" that occurs during the presentation of the case to the jury—it is "at the other end of the spectrum of constitutional errors" because it is a "structural defect" in the trial mechanism. *See Brecht v. Abrahamson*, 113 S. Ct. 1710, 1717 (1993) (noting that while impeaching a defendant based on his silence following *Miranda* warnings is mere "trial error," violation of the Sixth Amendment right to counsel is a crucial error because the Sixth Amendment is of critical importance).

2. The IAD Speedy Trial Guarantee Enhances The Soundness Of The Criminal Process.

Also, unlike the exclusionary rule in *Stone*, the IAD speedy trial guarantee enhances the soundness of the criminal process. The *Stone* Court based its ruling in part on the fact that the exclusionary rule diverted attention away from the ultimate question of guilt and excluded typically reliable evidence. 428 U.S. at 489-90. In *Withrow*, this Court declined to extend *Stone* in part on the basis that *Miranda* functions to prevent the use of coerced, and therefore potentially unreliable, statements at trial. Because *Miranda* does not "serve some value *necessarily divorced* from the correct ascertainment of guilt," *Stone*'s categorical exclusion from habeas review was inappropriate for claimed *Miranda* violations. 113 S. Ct. at 1753 (emphasis added).

In a separate opinion in *Withrow*, Justice O'Connor noted that *Miranda* also may exclude reliable evidence, pointing out that statements obtained in technical violation of *Miranda*—statements that are unwarned but voluntary—are very reliable. *Withrow*, 113 S. Ct. at 1762 (O'Connor, J., concurring in part, dissenting in part). Nevertheless, the *Withrow* majority refused to invoke *Stone* to preclude the habeas review of *Miranda* claims categorically, because some statements obtained in violation of *Miranda* are unreliable. Rather, the *Withrow* Court explained that in the long run a system that admits into evidence confessions obtained in violation of *Miranda* will be less reliable than a system that excludes such evidence. 113 S. Ct. at 1753. In other words, the Court decided that, as long as a right is not "necessarily divorced" from the correct ascertainment of guilt, *id.*, it would uphold the availability of federal court review for violations of that right.

In contrast to *Stone*, and like *Withrow*, the IAD's speedy trial guarantee enhances the soundness of the criminal process by requiring the State to proceed to trial promptly after bringing charges. In this manner the IAD's speedy trial guarantee serves

to prevent evidence from going stale, thereby enhancing the reliability of evidence and assisting in the correct ascertainment of guilt. *See Doggett*, 112 S. Ct. at 2692-93; *Barker*, 407 U.S. at 532. The importance of the speedy trial is heightened when, as here, the defendant is incarcerated and cannot keep track of potential witnesses. *See Smith*, 393 U.S. at 379-80. It becomes of paramount importance when a man is "isolated in prison" and is left "powerless to exert his own investigative efforts to mitigate the erosive effects of the passage of time," *id.*, as Petitioner here was. (J.A. 25, 87-88.)

Like *Miranda*, the IAD speedy trial guarantee requires prompt adjudication precisely to enhance the reliability of evidence. As such, this right does not "serve some value *necessarily* divorced from the correct ascertainment of guilt," *Withrow*, 113 S. Ct. at 1753 (emphasis added), and does not warrant *categorical* exclusion from habeas review under *Stone*. Therefore, the Court should decline to preclude categorically all IAD speedy trial claims from habeas review.

3. Prudential Concerns Do Not Justify Barring Habeas Review Of An IAD Speedy Trial Violation.

Eliminating review of IAD speedy trial violations would neither significantly benefit the federal courts in exercising habeas jurisdiction, nor substantially advance the cause of federalism. *See Withrow*, 113 S. Ct. at 1754.

a. Eliminating IAD Speedy Trial Claims Will Not Significantly Benefit The Federal Courts In Their Exercise Of Habeas Jurisdiction, Because Individuals Will Merely File Sixth Amendment Claims.

In *Withrow*, this Court refused to extend *Stone* to bar *Miranda* claims in part based on this Court's judgment that many habeas petitioners would merely recast their *Miranda* claims as due process claims. 113 S. Ct. at 1754. As *Withrow* recognized, due proc-

ess claims require federal courts to "look to the totality of circumstances to determine whether a confession was voluntary." *Id.* Hence, the *Withrow* Court concluded: "We thus fail to see how abdicating *Miranda's* bright-line (or at least brighter-line) rules in favor of an exhaustive totality of circumstances approach on habeas would do much of anything to lighten the burdens placed on busy federal courts." *Id.*

Here, an extension of *Stone* to IAD speedy trial violations likewise will fail to decrease the number of habeas filings. If this Court bars habeas claims based on the IAD's speedy trial guarantee, petitioners will merely recast their claims as Sixth Amendment speedy trial claims. Violations of the IAD's "bright-line" speedy trial guarantee are comparatively simple to discern and address, as the IAD plainly requires that a state commence trial within 120 days of obtaining custody or dismiss the charges with prejudice. Petitions alleging a violation of the Sixth Amendment right to a speedy trial, however, are more time-consuming and difficult to review because those claims require courts to apply an exhaustive multi-factored balancing test. *See Barker*, 407 U.S. at 530-33 (speedy trial balancing test "necessarily compels courts to approach speedy trial cases on an *ad hoc* basis," requiring courts to engage in "a difficult and sensitive balancing process").

Indeed, petitioners precluded from raising IAD speedy trial violations would be even more likely to file habeas petitions alleging a constitutional violation than those stopped from raising *Miranda* claims. As Justice O'Connor pointed out in *Withrow*, not every petitioner who alleged that he was in state custody as the result of a *Miranda* violation would be able to convert that claim into one alleging a due process violation; to do so would require an allegation of compulsion, thus leaving those who were not warned and spoke voluntarily without a claim. *Withrow*, 113 S. Ct. at 1762 (O'Connor, J., concurring in part, dissenting in part). Here, however, every petitioner who can file a claim for violation of the IAD's speedy trial guarantee will be able to recast

that claim as one for violation of his Sixth Amendment right to a speedy trial, as to do so requires no additional facts. Therefore, eliminating IAD speedy trial claims will not significantly benefit the federal courts in their exercise of habeas jurisdiction.

b. Eliminating IAD Speedy Trial Claims Will Not Substantially Advance The Cause Of Federalism.

The *Withrow* Court also refused to extend *Stone* because eliminating *Miranda* claims from habeas review would not substantially advance the cause of federalism. 113 S. Ct. at 1754. Although *Withrow* acknowledged that a federal habeas court creates some tension each time it overturns a state conviction, the Court stated, "[i]t is not reasonable . . . to expect such occurrences to be frequent enough to amount to a substantial cost of reviewing *Miranda* claims on habeas or to raise federal-state tensions to an appreciable degree." 113 S. Ct. at 1754-55. Further, the *Withrow* Court explained that there is little reason to believe that police are unwilling or unable to satisfy *Miranda*'s requirements. *Id.* at 1755.

Here, it is even less likely that federal courts will have to overturn state convictions based on the IAD's speedy trial guarantee with any frequency. *Miranda*'s setting is the rough and tumble world of the streets, where a "bright line" is often more illusory than real. The IAD's speedy trial guarantee, however, is fulfilled or denied in the courts, on the record and (usually) with counsel appearing for both sides. Indeed, the language of the IAD is clear and its provisions do not generally require complex balancing. Occasional exercise of the federal enforcement power will ensure that state courts will not ignore the plain dictates of this bright-line provision. *See Rose v. Mitchell*, 443 U.S. 545, 563 (1979) (refusing to extend *Stone* to bar equal protection claims because of the "educative" and deterrent effect of federal habeas review).[11]

[11] The instant case proves *Rose* correct. The trial court professed ignorance of the IAD's time limit (J.A. 113), despite having signed the Request for Tempo-

(Footnote continued on following page)

Furthermore, any federalism concerns are alleviated by the fact that the IAD is an interstate compact—a contract among the member states and the federal government. The parties to the IAD, *i.e.*, the federal government and forty-eight of the states, agreed to create and enforce a speedy trial right for prisoners transferred pursuant to the IAD. The signatory states agreed that when any one of them violated the speedy trial provisions of their agreement it would have to dismiss its charges with prejudice. Therefore, collateral review does not force states to abide by a federal court ruling like *Miranda*; rather, it involves uniform enforcement of the plain language of a compact to which the signatory states voluntarily agreed.[12] It will not intrude upon state comity to hold Indiana to the terms of its own agreement.

In addition, such review does not have an adverse interest on comity because the states anticipate that federal courts will review state courts' interpretation of the IAD. Section 5 of the IAD explicitly provides that "[a]ll courts . . . of the United States . . . are hereby directed to enforce the agreement . . . ." 18 U.S.C. app. § 5.[13]

Thus, the considerations that led to the ruling in *Stone* do not justify barring IAD speedy trial claims from federal habeas corpus. As this Court recently concluded in *Withrow*, federal collateral review is necessary to protect federal rights, even if it is not frequently invoked:

> And if, finally, one should question the need for federal collateral review of requirements that merit such respect,

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rary Custody, which cites the speedy provision of the IAD (J.A. 5), and despite Petitioner's several references to the IAD's time limits in his motions. (J.A. 56, 88, 91.) Federal enforcement of the IAD would educate the state courts.

[12] There is no requirement that states enter into the compact. Two states, Louisiana and Mississippi, have chosen not to join.

[13] This provision was part of the IAD when Indiana joined the agreement. Further, none of the states that became signatories before the United States exercised their right to withdraw when the United States signed the IAD. *See* Art. VIII, 18 U.S.C. app. § 2 (withdrawal rights).

> the answer simply is that the respect is sustained in no small part by the existence of such review. "It is the occasional abuse that the federal writ of habeas corpus stands ready to correct."

113 S. Ct. at 1755 (quoting *Jackson v. Virginia*, 443 U.S. 307, 322 (1979)).

II. FEDERAL COURTS SHOULD REVIEW IAD SPEEDY TRIAL CLAIMS UNDER 28 U.S.C. § 2254 AS THEY DO CONSTITUTIONAL CLAIMS.

Even absent the decision below applying *Stone v. Powell*, the federal courts remain splintered as to how to conduct habeas review of IAD violations. Some courts have evaluated claims of IAD speedy trial violations under section 2254 as they would claims of constitutional violations.[14] Other courts have required a heightened threshold showing of a "fundamental defect" amounting to a "miscarriage of justice" or "exceptional circumstances" before providing collateral review to claimed IAD violations. But the courts requiring the threshold showing have split among themselves as to whether IAD speedy trial violations make that showing: some courts have concluded that a violation of the IAD's speedy trial guarantee constitutes a sufficient showing because Congress's decision to mandate dismissal with prejudice as the only remedy for a speedy trial violation demonstrates its view of the seriousness of these violations; other courts have required a specific showing of actual prejudice flowing from the violation.[15] This case provides an appropriate opportunity for this Court to resolve this current split among the circuits.

[14] *See Birdwell v. Skeen*, 983 F.2d 1332, 1341 (5th Cir. 1993); *Cody v. Morris*, 623 F.2d 101, 103 (9th Cir. 1980); *United States ex rel. Escola v. Groomes*, 520 F.2d 830, 839 (3d Cir. 1975); *see also Mars v. United States*, 615 F.2d 704, 710 (6th Cir.) (Edwards, C.J., dissenting) (urging that no higher standard should apply to nonconstitutional claims), *cert. denied*, 449 U.S. 849 (1980); *United States v. Williams*, 615 F.2d 585, 589-90 (3d Cir. 1980) (granting relief under section 2255 for IAD violation).

[15] Compare *Brown v. Wolff*, 706 F.2d 902, 905 (9th Cir. 1983) ("we have little difficulty concluding that . . . a violation of the timely trial provisions presents

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This Court should hold that federal courts are to review IAD violations asserted under section 2254 in the same way and under the same standards as they review constitutional violations under section 2254. IAD speedy trial violations should receive the same review as constitutional claims because Congress enacted the IAD to safeguard prisoners' Sixth Amendment right to a speedy trial and because the IAD is a congressionally approved interstate compact that requires uniform federal interpretation. Alternatively, should this Court conclude that some higher threshold standard is required for collateral review of claimed violations of the IAD (or of federal laws generally) than is required for claimed violations of the federal Constitution, it should hold that IAD speedy trial violations meet this higher standard because Congress has mandated dismissal as the sole remedy for these violations, rather than leaving the question of remedy to the discretion of the courts.

A. The IAD Protects A Constitutional Right; Therefore, Federal Courts Should Review Violations Of The IAD Speedy Trial Guarantee As They Do Violations Of Constitutional Rights Under Section 2254.

Because the IAD's speedy trial guarantee effectuates a constitutional right, a state prisoner who asserts a violation of the

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an 'exceptional circumstance . . . .' ") *with Reilly v. Warden, FCI Petersburg*, 947 F.2d 43, 44-45 (2d Cir. 1991) (per curiam) (no exceptional circumstances in IAD violation), *cert. denied*, 112 S. Ct. 1227 (1992); *Seymore v. Alabama*, 846 F.2d 1355, 1359 (11th Cir. 1988) (requiring prejudice), *cert. denied*, 488 U.S. 1018 (1989); *Metheny v. Hamby*, 835 F.2d 672, 675 (6th Cir. 1987) (no fundamental defect), *cert. denied*, 488 U.S. 913 (1988); *Casper v. Ryan*, 822 F.2d 1283, 1290 (3d Cir. 1987) (distinguishing *Escola* and suggesting that "mandatory sanction of dismissal was just one of the factors that led" the court to grant habeas relief in *United States v. Williams*, 615 F.2d 585 (3d Cir. 1980)), *cert. denied*, 484 U.S. 1012 (1988); *Kerr v. Finkbeiner*, 757 F.2d 604, 607 (4th Cir.) (no claim in absence of prejudice), *cert. denied*, 474 U.S. 929 (1985); *Fasano v. Hall*, 615 F.2d 555, 558-59 (1st Cir.) (IAD violations not fundamental defects), *cert. denied*, 449 U.S. 867 (1980).

IAD's speedy trial guarantee asserts a claim of constitutional dimension. Accordingly, his claim should be collaterally reviewed as are constitutional violations under section 2254.

This Court's opinion in *Withrow* fully supports this conclusion. A violation of the IAD's speedy trial guarantee is akin to the federal claim asserted by the state petitioner in *Withrow*, which was based on a violation of the requirements of *Miranda*'s "prophylactic" safeguards of the Fifth Amendment. *See* 113 S. Ct. at 1752. Those safeguards were established by this Court specifically to protect a defendant's constitutional right against self-incrimination. 113 S. Ct. at 1753 (" 'Prophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination *Miranda* safeguards 'a fundamental *trial* right.' " (Court's emphasis; citation omitted)).

Withrow, therefore, involved a violation of one of the "laws . . . of the United States"—the *Miranda* prophylactic rule—and not necessarily a direct violation of the Constitution. This Court nonetheless held that the petitioner was entitled to have a federal court review the merits of his claim in a section 2254 proceeding. The Court did not subject the *Miranda* claim before it to any higher threshold for collateral review because it alleged a violation of a law of the United States. Nor did the Court impose any additional burdens on the state petitioner, such as an "exceptional circumstances" or "miscarriage of justice" requirement, before the merits of the petitioner's *Miranda* claim could be reviewed under section 2254. *Withrow*, 113 S. Ct. at 1750-55.

Rather than leave it to the courts to address speedy trial right violations on a case by case basis or to fashion a prophylactic rule to protect speedy trial rights, Congress adopted a rule explicitly requiring state courts to try prisoners transferred to them under the IAD within 120 days or dismiss the charges with prejudice. Art. IV(c), V(c), 18 U.S.C. app. § 2. There is no basis in this Court's jurisprudence or in section 2254 for holding a state prisoner claiming that he is in custody in violation of the IAD's

speedy trial guarantee to a different, higher standard than a state prisoner alleging a violation of *Miranda*.

Indeed, this Court implicitly recognized in *Carchman v. Nash*, 473 U.S. 716 (1985), that alleged violations of the IAD's speedy trial guarantee should be reviewed under section 2254 in the same manner as constitutional violations. In *Carchman*, a state prisoner in Pennsylvania sought habeas relief under section 2254, alleging that the State of Kentucky had violated the IAD by not bringing him to trial on a probation-violation charge within 180 days of the prisoner's demand to be tried, as mandated by the Article III of the IAD. Art. III(a), 18 U.S.C. app. § 2. The Court fully evaluated the merits of the petitioner's IAD claim, as it would a constitutional violation. 473 U.S. at 726-34. Although the Court ultimately determined that the IAD does not apply to probation violations, it did not employ any higher or different standard of review in *Carchman* than it employs for constitutional claims. In other words, the Court did not require the petitioner to demonstrate "exceptional circumstances" or a "miscarriage of justice" before considering the merits of his IAD claim. Thus, *Carchman* stands for the proposition that full collateral review of alleged IAD violations is appropriate and necessary under section 2254.

The Court should make explicit what already is implicit in *Withrow* and *Carchman*: because the IAD speedy trial guarantee is expressly intended to safeguard a fundamental constitutional right, claimed violations of that guarantee should be subject to collateral review identical to the collateral review accorded claimed violations of the Constitution under section 2254.

B. The IAD Is An Interstate Compact; Federal Review Under Section 2254 Is Necessary To Ensure Uniform Interpretation Of, And Compliance With, The IAD.

Full collateral review of IAD violations under section 2254 also is appropriate because the IAD is an interstate compact,

which must be interpreted and applied uniformly to accomplish the purpose that Congress intended: the establishment of an interstate system for the "expeditious and orderly disposition" of outstanding charges pending against individuals incarcerated in other member jurisdictions. *See* Art. I, 18 U.S.C. app. § 2. Federal review under section 2254 is essential to achieving uniform interpretation, an important goal since forty-eight states and the federal government rely on the IAD's provisions to lodge interstate detainers and bring out-of-state incarcerated defendants to trial. Uniform interpretation will permit the entire system to operate more efficiently, as state officials will be more cognizant of the IAD's requirements.

This Court repeatedly has emphasized that federal courts have a duty, originating in the Compact Clause and the Supremacy Clause of the United States Constitution (U.S. Const. art. I, § 10, cl. 3; art. VI, cl. 2), to conduct an independent review of states' compliance with interstate compacts. *See, e.g., West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28-29 (1951) (construing Ohio River Valley Water Sanitation Compact). This duty includes reviewing a state's interpretation of its obligations under a compact and a state's own determination that it has satisfied the compact's obligations:

> Deference is one thing; submission to a State's own determination of whether it has undertaken an obligation, what that obligation is, and whether it conflicts with a disability of the State to undertake it is quite another.

Id. at 28; *see also Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278 (1959); *Delaware River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419, 427 (1940).

Where the terms of a compact are unambiguous, it "must be construed and applied in accordance with its terms." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (construing Pecos River Compact); *Texas v. New Mexico*, 462 U.S. 554, 564 (1983) ("unless the compact to which Congress has consented is somehow

unconstitutional, no court may order relief inconsistent with its express terms"). And where a federal court finds that a state has violated the terms of an interstate compact, it has the power to "rectify[ ] a failure to perform in the past as well as ordering future performance called for by the Compact." *Texas v. New Mexico*, 482 U.S. at 128.

These basic principles apply to federal courts reviewing claimed IAD violations under section 2254, as this Court held in *Carchman v. Nash*, 473 U.S. at 719 ("The [IAD] is a congressionally sanctioned compact within the Compact Clause . . . and thus is a federal law subject to federal construction."). Indeed, Congress expressly directed in the IAD that its provisions were to be enforced by "all courts . . . of the United States." 18 U.S.C. app. § 5. The plain language of that broad directive necessarily encompasses federal courts reviewing habeas corpus petitions. Thus, federal habeas courts have both a statutory duty under the express terms of the IAD and a constitutional duty under the Compact and Supremacy Clauses to review fully whether a state holds a prisoner in custody in violation of the IAD and to rectify a state's violation of the compact by issuing the writ.

This case pointedly illustrates the need for federal collateral review of states' compliance with the IAD. The IAD, like any interstate compact, provides benefits and imposes obligations. Here, Indiana received the benefit of obtaining Petitioner from federal custody to try him for theft. In exchange for that benefit, Indiana was obligated to try Petitioner within 120 days of his arrival in state custody or dismiss the charges against him with prejudice. Indiana received the benefit of the IAD here, but avoided its speedy trial obligation. In the absence of federal collateral review, states will be able to reap the benefits but avoid the obligations imposed by the IAD, just as did Indiana here. The result is an undermining of the entire interstate detainer system, a system based by necessity on cooperation between participating

States. *See* Art. I, 18 U.S.C. app. § 2 (proceedings on detainers "cannot properly be had in the absence of cooperative procedures").

The court of appeals below expressed the view that since the IAD was enacted by the state legislatures as well as Congress, there is no reason to believe that the courts of any state are more likely to undermine the IAD than any other of their own state laws. (J.A. 204-05.) But this overlooks the fact that the state legislatures had to enact the IAD on a substantive "take it or leave it" basis. To ensure the ability to obtain an inmate from another jurisdiction, for example, Indiana had to agree to try him within 120 days—and while the benefit of being able to bring a charged person to trial may be popular with the state legislature, the obligation to try that person within 120 days or dismiss the charges might not be as popular with the state judiciary. Indeed, Petitioner's state trial court professed ignorance of the IAD's 120-day requirement despite having certified the Request for Temporary Custody and despite Petitioner's IAD speedy trial motions. (J.A. 5-6, 56, 88, 91, 113.)

Hence, federal enforcement is necessary to ensure that the speedy trial rights that so concerned Congress are uniformly protected by all IAD signatories. In other words, federal review is needed to assure that the signatories to this interstate compact do not invoke the benefit of their agreement while ignoring their contractual obligations under it.

C. The Lower Courts That Have Adopted A Higher Standard For Collateral Review Of IAD Speedy Trial Violations Have Erroneously Borrowed That Standard From Section 2255 Cases Without Recognizing The Crucial Distinction Between Section 2255 Claims And Section 2254 Claims.

A number of lower courts have adopted a heightened threshold standard for conducting collateral review of IAD speedy trial

claims.[16] In doing so, these courts typically rely upon four decisions of this Court in cases brought by federal prisoners under section 2255: *United States v. Timmreck*, 441 U.S. 780 (1979); *Davis v. United States*, 417 U.S. 333 (1974); *Hill v. United States*, 368 U.S. 424 (1962); *Sunal v. Large*, 332 U.S. 174 (1947).

In fact, these cases do not support the conclusion that state prisoners' federal habeas claims that they are in custody in violation of the IAD speedy trial guarantee are to be subjected to a threshold standard higher than that for their federal habeas claims of constitutional violations. The error stems from the failure of the lower courts to appreciate the crucial difference between federal prisoners petitioning under section 2255 and state prisoners petitioning under section 2254: the federal prisoners already have had federal review of their federal law and constitutional claims; the state prisoners have not. As this Court noted in *United States v. Frady*, "a federal prisoner like Frady, unlike his state counterparts, has already had an opportunity to present his federal claims in federal trial and appellate forums." 456 U.S. 152, 166 (1982).

Review of these four cases demonstrates that they do not speak to the issue of whether state prisoner claims of IAD speedy trial violations—or of violations of "laws . . . of the United States" generally—should be subjected to a higher threshold standard than state prisoner claims of direct constitutional violations. In each of these cases, the petitioner (a federal prisoner) already had had an opportunity to have his federal "laws" claim reviewed by a federal court on direct appeal, before he filed his section 2255 petition alleging that his custody violated the "laws . . . of the United States." The petitioners in *Sunal*, *Hill*, and *Timmreck* had not appealed their federal convictions, and therefore had failed to take advantage of the opportunity for federal appellate review. Therefore, in each of those three cases, the petitioner was subject to the "general rule" that "[s]o far as *convictions obtained in the*

[16] *See* cases listed in footnote 15.

federal courts are concerned, . . . the writ of *habeas corpus* will not be allowed to do service for an appeal." *Sunal*, 332 U.S. at 178 (emphasis added); *see also Timmreck*, 441 U.S. at 784 ("[His claim] could have been raised on direct appeal . . . [a]nd there is no basis here for allowing collateral attack 'to do service for an appeal.' " (citation omitted)). The petitioner in *Davis* had raised his federal "laws" claim on direct appeal of his federal conviction and had lost. *Davis*, 417 U.S. at 337-39. He therefore already had obtained federal appellate review of his federal question.

There are sound reasons for this Court to impose a higher threshold standard on a federal prisoner's efforts to take a second trip through the federal courts on claims that he raised or could have raised in his criminal trial and appellate proceedings. This approach balances the need to conserve federal judicial resources against the federal prisoner's interest in having still further access to a federal court.

The practical need for a heightened threshold standard in section 2255 cases is brought into sharp focus when one considers the impact of the inclusion of "laws . . . of the United States" on the scope of that statute. Virtually every ruling in every federal criminal case hinges upon "laws . . . of the United States." Absent a heightened standard, any alleged federal defendant, even one who pleads guilty, could assert that any violation of a federal rule of criminal procedure during his federal trial or sentencing, no matter how minor or technical or harmless, constitutes a violation of one of the "laws . . . of the United States" entitling him to section 2255 habeas relief.[17] Indeed, this is the precise situation

[17] *See Edwards v. United States*, 564 F.2d 652, 654 (2d Cir. 1977) ("[A]lthough there was not the same need for including the term 'laws of the United States' in § 2255 as there was in § 2254 relating to state prisoners, Congress did so; on the other hand, since a literal reading would lead to the absurd conclusion that any non-harmless error in a federal criminal trial would provide grounds for collateral attack, the Supreme Court has provided a gloss that § 2255 relief is to

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that the Court addressed in *Hill* and *Timmreck* when it looked to whether the federal prisoner could demonstrate "exceptional circumstances" or a "miscarriage of justice" before it affirmed the denial of the writ. *See Hill*, 368 U.S. at 425 (alleged violation of Fed. R. Crim. P. 32(a)); *Timmreck*, 441 U.S. at 781 (alleged violation of Fed. R. Crim. P. 11).[18]

The same considerations do not apply when a state prisoner seeks collateral relief under section 2254. Prior to the filing of his section 2254 petition, a state prisoner has had no meaningful opportunity to have a federal court consider any federal claim. *See United States v. Frady*, 456 U.S. at 164 (noting the importance of federal court review of federal claims: "[o]nce the [federal] defendant's chance to appeal has been waived or exhausted . . . we are entitled to presume he stands fairly and finally convicted, especially when, as here, he already has had a fair opportunity to present his federal claims to a federal forum."); *Reed v. Ross*, 468 U.S. 1, 10 (1984) (noting that Congress enacted section 2254 to make federal courts serve " 'as guardians of the people's federal rights' " (citation omitted)).

Furthermore, as practical experience teaches, the inclusion of "laws . . . of the United States" in the scope of section 2254 has only a negligible effect on the habeas docket of the federal courts because so few "laws . . . of the United States" have any impact

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be given in cases not involving constitutional errors or lack of jurisdiction only when the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice' and presents 'exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent.' " (citations omitted)).

[18] That section 2255 relief does not encompass all claimed errors of federal law was also acknowledged by this Court in another section 2255 case, *United States v. Addonizio*, 442 U.S. 178 (1979). In *Addonizio*, the Court suggested that a petitioner must assert a lack of jurisdiction, constitutional error, or " 'a fundamental defect which inherently results in a complete miscarriage of justice' " to be entitled to section 2255 relief. *Id.* at 185 (quoting *Stone v. Powell*, 428 U.S. 465, 477 n.10, and *Hill*, 368 U.S. at 428).

upon state criminal proceedings.[19] And all section 2254 petitions also are subject to rules, created in the interests of comity and federalism, which have the same effect of controlling to some extent the habeas docket of the federal courts. A state prisoner who did not raise his federal claim in his state court proceedings, or who raised the federal claim but abandoned it, is barred under the procedural default doctrine from asserting his federal claim in a section 2254 proceeding unless the prisoner can demonstrate cause for the default and actual prejudice, or that failure to consider the claims will result in a "fundamental miscarriage of justice." *See Engle v. Isaac*, 456 U.S. 107, 129, 135 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977). And a state prisoner who already has had the benefit of one round of federal habeas review, but files a successive section 2254 petition, also must show either cause and prejudice or that a fundamental miscarriage of justice would result from failure to entertain his second petition. *See McCleskey v. Zant*, 111 S. Ct. 1454, 1470 (1991).

[19] Indeed, apart from the IAD itself only one federal statute appears to have any significant impact on state prosecutions: the federal wiretap statute, 18 U.S.C. § 2515. The fact that very few "laws . . . of the United States" have any affect on state criminal proceedings does not diminish the importance of protecting the rights that Congress provided in those few statutes on collateral review. In fact, history suggests that when Congress enacted section 2254's predecessor, the Habeas Corpus Act of February 5, 1887, ch. 28, 14 Stat. 385 ("1867 Habeas Corpus Act"), and included the language "laws . . . of the United States," it did so to enable individuals to petition for habeas relief for violations of the new federal Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27 ("1866 Civil Rights Act"). *See* Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31, 44 (1965). The 1867 Habeas Corpus Act was introduced in Congress only two weeks after the 1866 Civil Rights Act was passed (and two years before the States ratified the Fourteenth Amendment). *Id.*; 2 Charles Warren, *The Supreme Court in United States History* 465 (1937); *see also Fay v. Noia*, 372 U.S. 391, 401 n.9 (1963) (the 1867 Habeas Corpus Act "was passed in anticipation of possible Southern recalcitrance toward Reconstruction legislation"). In fact, in the first reported case brought under the 1867 Habeas Corpus Act, *In re Turner*, 24 F. Cas. 337, 338 (D. Md. 1867) (No. 14,247), the petitioner claimed a violation of the 1866 Civil Rights Act, as well as of the Thirteenth Amendment. The court granted the habeas petition based in part on its conclusion that the petitioner was restrained in violation of the 1866 Civil Rights Act—a "law of the United States." *Id.* at 339.

The *Sunal-Davis* cases addressing section 2255 claims do not provide a basis for creating a higher threshold standard for federal collateral review of IAD speedy trial violations. Indeed, there is *no* reason for imposing a higher threshold upon the first habeas petition of a state prisoner who has presented his claim to the state courts. The importance of the interest at issue cannot be questioned: the IAD speedy trial guarantee safeguards a fundamental Sixth Amendment right. Comity and federalism do not require a higher standard: the IAD is an interstate compact to which Indiana voluntarily agreed, and which requires the uniform interpretation that only federal review can ensure. Finally, nothing in the plain language of section 2254 justifies making a distinction between constitutional claims and claimed violations of federal law. *See Davis*, 417 U.S. at 344 ("the clear and simple language of § 2254 authoriz[es] habeas corpus relief 'on the ground that [the prisoner] is in custody in violation of the . . . laws . . . of the United States' " (alterations and ellipses in original)). Consequently, IAD speedy trial claims should receive the same treatment that constitutional claims receive on habeas review.

D. Violations Of The IAD's Speedy Trial Guarantee Constitute "Exceptional Circumstances" And A "Miscarriage Of Justice."

Even if showing "exceptional circumstances" or "a miscarriage of justice" were a proper prerequisite for obtaining federal collateral relief for violations of the IAD or of federal laws generally, the State's violation of the IAD's speedy trial guarantee should fulfill that prerequisite without a further showing of actual prejudice.

As discussed above in Section II(A), the IAD's speedy trial guarantee safeguards the Sixth Amendment's fundamental right to a speedy trial. Congress judged the IAD's speedy trial guarantee so important that it mandated that pending charges against a

transferred prisoner be dismissed with prejudice whenever a state violates those requirements. That Congress selected a very strict sanction—dismissal with prejudice—and did not provide the courts with discretion whether to apply it demonstrates Congress's judgment that violations of the IAD's speedy trial guarantees are not harmless or technical errors, but fundamental defects, and further demonstrates Congress's intent that defendants not tried within the prescribed time limits should not be tried under any circumstances. It also demonstrates Congress's awareness of the practical difficulties of proving actual prejudice flowing from a speedy trial violation, difficulties this Court has recognized as well. *See Doggett*, 112 S. Ct. at 2692-93; *Barker*, 407 U.S. at 532.[20]

Indeed, because the mandatory dismissal sanction absolutely bars trials outside the prescribed time limits, a violation of the IAD's speedy trial requirement resembles a jurisdictional defect. An IAD speedy trial violation goes not to the question of how a defendant should be tried, but rather to whether the defendant should be tried at all. A trial outside the 120-day time period is analogous to a trial held by a court having no jurisdiction to try the defendant. A violation of the IAD's speedy trial requirement, by virtue of the IAD's mandatory dismissal sanction, therefore resembles the type of error, *i.e.*, lack of jurisdiction, that historically has been subject to habeas review. *See, e.g.*, *Ex parte Siebold*, 100 U.S. 371, 377 (1879); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176 (1873). A conviction rendered in a court that lacks jurisdic-

[20] A requirement of showing actual prejudice is found neither in the IAD nor in any of this Court's opinions interpreting it. The IAD states only that a "court . . . *shall* enter an order dismissing the [charges] with prejudice" for failure to try a prisoner within the specified time. Art. V(c), 18 U.S.C. app. § 2 (emphasis added). This Court has enforced this provision literally. In *United States v. Mauro*, 436 U.S. 340, 364-65 (1978), the Court affirmed the dismissal of charges against a defendant for violation of the IAD's timely trial provision without requiring the defendant to prove that he was prejudiced by the delay. *Accord Brown v. Wolff*, 706 F.2d 902, 906 (9th Cir. 1983) (rejecting requirement of showing prejudice); *Cody v. Morris*, 623 F.2d 101, 103 (9th Cir. 1980).

tion is a fundamental miscarriage of justice. *See, e.g., Bowen v. Johnston*, 306 U.S. 19, 23, 27 (1939).

Furthermore, because the IAD is an interstate compact, violations of its provisions implicate more than local interests or the fate of individual defendants. A State's failure or refusal to abide by the terms of the IAD subverts the integrity and efficiency of the entire detainer system. This too constitutes an "exceptional circumstance" that warrants federal habeas review of IAD violations.

Thus, despite the inappropriateness of imposing extra burdens such as an "exceptional circumstances" or "miscarriage of justice" test on state petitioners who, like Petitioner, seek section 2254 relief for IAD violations, it is clear that state petitioners with IAD claims can satisfy those tests.

III. THE PLAIN LANGUAGE OF THE IAD, WHICH THE STATE COURTS OVERLOOKED, REQUIRES DISMISSAL OF THE CHARGES AGAINST PETITIONER.

Because the IAD is an interstate compact and a federal law, courts applying it have an obligation to conduct themselves in accordance with its plain language. *E.g., Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (courts are not free to modify or disregard the requirements of an interstate compact, and must grant relief in accordance with its express terms); *Negonsott v. Samuels*, 113 S. Ct. 1119, 1122-23 (1993) (a court's task "is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive" (quotations omitted)); *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) (court must presume that Congress "says in a statute what it means and means in a statute what it says there").

The state courts in Petitioner's case did not effectuate the plain language of the IAD, which required dismissal with prejudice

after 120 days. Indeed, the trial court even admitted to ignorance of the 120-day speedy trial period prescribed by the plain language of the IAD. (J.A. 113.) The order denying Petitioner's motion to dismiss provided no explanation (J.A. 125), but at the motion hearing, the court blamed Petitioner for the court's ignorance, refused to acknowledge that dismissal of the charges was the proper relief, and stated, incorrectly, that Petitioner had not made a speedy trial demand. (J.A. 113-14.) The record, however, establishes that, even proceeding *pro se*, Petitioner requested compliance with the IAD's speedy trial provision in at least three different written motions. (J.A. 56, 88, 90-91.) This Court has concluded that the actions of a defendant who did far less than Petitioner to assert and protect his IAD speedy trial rights were sufficient to put the State on notice of an IAD claim. *United States v. Mauro*, 436 U.S. 340, 364-65 (1978) (government on notice of IAD speedy trial claim when transferred prisoner Ford demanded trial, even though he did not specifically invoke the IAD).

Even if the trial court had been correct about Petitioner's supposed failure to make a demand (the Indiana Supreme Court recognized that this was not correct), the IAD does not require the defendant to make a demand or to alert the court to its 120-day time limit. Article IV(c) of the IAD commands that "trial *shall* be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State"; hence, the obligation to comply with the IAD rests with the State or the state court, not with the transferred prisoner. *See, e.g., Brown v. Wolff*, 706 F.2d 902, 907 (9th Cir. 1983).

Furthermore, the record demonstrates that the State and the state court are chargeable with knowledge of the IAD's speedy trial guarantee: to obtain Petitioner from federal custody, the prosecutor pledged in writing that he would "bring [Petitioner] to trial . . . within the time specified in Article IV(c)" of the IAD (J.A. 5); and the state court certified on the same document that

it would follow the "terms and the provisions of the Agreement on Detainers." (J.A. 5-6.) It is almost inconceivable that these State officials would execute this transfer document without bothering to check the provisions cited therein that specify their obligations under the IAD.

The Indiana Supreme Court acknowledged that Petitioner had "made a general demand that the trial be held within the time limits of the IAD," rejecting the trial court's conclusion to the contrary. (J.A. 156.) Despite recognizing that Petitioner had demanded a trial within the time limit, the Court imposed an additional requirement that Petitioner object to the untimely trial date "at the time the [trial] date was set or during the remainder of the time limit." (J.A. 157.) Here again, though, the express language of the IAD—which the Indiana Supreme Court failed to reference—requires no demand and no objection. Art. IV(a), 18 U.S.C. app. § 2. Equally important, the Indiana Supreme Court's conclusion is incorrect. The trial court wanted all motions in writing. (J.A. 39-40, 123.) Petitioner objected in writing to the untimely trial date on July 26, arguing that the State was "forcing [him] to be tried beyond the limits as set forth in the Agreement on Detainer Act." (J.A. 56.) Furthermore, his three written motions raising the IAD's time limits, filed on July 26, July 29, and August 10 were all filed "during the remainder of the [IAD's] time limit." (J.A. 56, 88, 91.)[21]

On habeas review, the federal district court rejected Petitioner's habeas corpus petition on a ground not mentioned by the state courts: the district court held that Petitioner had been "unable to stand trial" under IAD Article VI(a), because of the number of pretrial motions he filed. (J.A. 196.) That Article provides

[21] The Indiana Supreme Court also suggested that by filing other defense motions after the setting of the trial date on August 1, Petitioner indicated a willingness to go to trial after the 120-day period. (J.A. 157.) Such a ruling would place a defendant in the untenable position of waiving either his speedy trial claim or the remainder of his defenses. Nothing in the IAD permits this analysis.

that the running of the IAD's time limitations shall be tolled "whenever and for long as a prisoner is unable to stand trial as determined by the court having jurisdiction of the matter." 18 U.S.C. app. § 2. This ruling misconstrued the phrase "unable to stand trial." When Congress enacted the IAD, the phrase "unable to stand trial" uniformly was understood to refer to a party's physical or mental ability to stand trial. *Birdwell v. Skeen*, 983 F.2d 1332, 1340-41 (5th Cir. 1993) (analyzing history and use of the phrase); *United States v. Taylor*, 861 F.2d 316, 322 (1st Cir. 1988); *see Pioneer Ins. Servs. v. Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489, 1495 (1993) (noting that the words in Congress's enactments are "to carry their ordinary, *contemporary*, common meaning" (emphasis added)). Petitioner was mentally competent and physically able to stand trial throughout the 120-day period.

Moreover, the district court's decision would be erroneous even if Congress had intended "unable to stand trial" to encompass the filing of pretrial motions. Article IV(a) requires "the court having jurisdiction of the matter," *i.e.*, the state trial court, to have "determined" this inability; the trial court made no such determination. Further, the record does not reflect that that court actually had any difficulty addressing Petitioner's motions in a prompt fashion. In fact, the record does contain the trial court's explanation for the delay, *i.e.*, a generally congested docket and other scheduling problems unrelated to Petitioner's motions. (J.A. 86.)[22]

[22] A crowded docket does not qualify as "good cause" to toll the IAD's speedy trial requirements. *United States v. Ford*, 550 F.2d 732, 743 (2d Cir. 1977) (trial continuances due to court's "already full" calendar are neither " 'necessary,' 'reasonable,' [n]or 'for good cause' within the meaning of the [IAD]"), *aff'd sub nom. United States v. Mauro*, 436 U.S. 340 (1978). While there is nothing in the record concerning the court's congested docket, it does not appear to be the result of numerous criminal cases. When Petitioner was charged on December 15, 1982, his was (at most) only the 55th criminal case placed on the Fulton County Circuit Court's docket in 1982.

The plain language of the IAD required dismissal of the charges against Petitioner. Each of the courts that has reviewed Petitioner's IAD claim failed to enforce the IAD's unambiguous provisions. As a result, Petitioner was tried and convicted, and is held in custody, in violation of one of the "laws . . . of the United States." A writ of habeas corpus should issue.

CONCLUSION

For the foregoing reasons, Petitioner Orrin Scott Reed respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit and enter a judgment granting him a writ of habeas corpus. Alternatively, Petitioner requests that the Court remand this case to the United States Court of Appeals for the Seventh Circuit, directing the court of appeals to review the merits of his habeas claim.

Respectfully submitted,

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Dated: December 23, 1993

APPENDIX

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution:

Art. I, § 10, cl. 3:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Code, Appendix, Title 18:

§ 1. Short title

This Act may be cited as the "Interstate Agreement on Detainers Act".

§ 2. Enactment into law of Interstate Agreement on Detainers

The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining in substantially the following form:

"The contracting States solemnly agree that:

"ARTICLE I

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, information, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

"ARTICLE II

"As used in this agreement:

"(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"(b) 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request

for custody or availability is initiated pursuant to article IV hereof.

"(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

"ARTICLE III

"(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided,* That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

"(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

"(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement

and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

"(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

"ARTICLE IV

"(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided,* That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further,* That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

"(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the re-

ceiving State who has lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

"(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

"(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not affirmatively consented to or ordered such delivery.

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"ARTICLE V

"(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate

authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

"(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

"(1) Proper identification and evidence of his authority to act for the State into whose temporary custody this prisoner is to be given.

"(2) A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

"(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

"(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

"(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

"(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

"(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

"(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.

"ARTICLE VI

"(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

"(b) No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

"ARTICLE VII

"Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the State, information necessary to the effective operation of this agreement.

"ARTICLE VIII

"This agreement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

"ARTICLE IX

"This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party

State or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any State party hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters."

§ 3. Definition of term "Governor" for purposes of United States and District of Columbia

The term "Governor" as used in the agreement on detainers shall mean with respect to the United States, the Attorney General, and with respect to the District of Columbia, the Mayor of the District of Columbia.

§ 4. Definition of term "appropriate court"

The term "appropriate court" as used in the agreement on detainers shall mean with respect to the United States, the courts of the United States, and with respect to the District of Columbia, the courts of the District of Columbia, in which indictments, informations, or complaints, for which disposition is sought, are pending.

§ 5. Enforcement and cooperation by courts, departments, agencies, officers, and employees of United States and District of Columbia

All courts, departments, agencies, officers, and employees of the United States and of the District of Columbia are hereby directed to enforce the agreement on detainers and to cooperate with one another and with all party States in enforcing the agreement and effectuating its purpose.

§ 6. Regulations, forms, and instructions

For the United States, the Attorney General, and for the District of Columbia, the Mayor of the District of Columbia, shall establish such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this Act.

§ 7. Reservation of right to alter, amend, or repeal

The right to alter, amend, or repeal this Act is expressly reserved.

§ 8. Effective Date

This Act shall take effect on the ninetieth day after the date of its enactment.

§ 9. Special Provisions when United States is a Receiving State

Notwithstanding any provision of the agreement on detainers to the contrary, in a case in which the United States is a receiving State—

(1) any order of a court dismissing any indictment, information, or complaint may be with or without prejudice. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: The seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of the agreement on detainers and on the administration of justice; and

(2) it shall not be a violation of the agreement on detainers if prior to trial the prisoner is returned to the custody of the sending State pursuant to an order of the appropriate court issued after reasonable notice to the prisoner and the United States and an opportunity for a hearing.

United States Code, Title 28:

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court there of; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court

for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

§ 2254. State custody; remedies in State courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were

parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support

such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

No. 93-5418

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ORRIN SCOTT REED,

Petitioner,

v.

ROBERT FARLEY, Superintendent,
Indiana State Prison, *et al.*,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal courts have jurisdiction to grant *habeas corpus* relief based on alleged violations of the Interstate Agreement on Detainers ("IAD"), an agreement voluntarily entered into by some of the States, and from which States may withdraw at any time by repealing state statutes adopting the IAD.

2. Whether, assuming jurisdiction over such claims exists, alleged technical violations of the IAD which have been rejected by the state courts on direct review support collateral review on federal *habeas corpus* relief and, if so, under what circumstances.

3. Whether this Court should consider the merits of petitioner's IAD claim where it was not adjudicated by the court of appeals and where no issue regarding the merits of the claim was presented in the Petition for Writ of Certiorari.

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No. 93-5418

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BRIEF OF RESPONDENTS

JURISDICTIONAL STATEMENT

Respondents accept the jurisdictional statement of petitioner with one significant exception. Petitioner's jurisdictional statement implicitly assumes that the district court had jurisdiction to entertain a petition for writ of *habeas corpus* based on alleged violations of the IAD. As shown in Part I of the Argument, *infra*, the IAD was voluntarily

entered into by several States, rather than imposed upon them by the federal constitution or by federal statutes. Therefore, it is not a "law[] . . . of the United States" within the meaning of statutes granting the federal courts jurisdiction to issue writs of *habeas corpus*.[1]

RELEVANT STATUTES

In addition to the provisions cited by the petitioner, this case involves Ind. Code § 35-33-10-4 (1993), the statute by which Indiana adopted the IAD. The text of Ind. Code § 35-33-10-4 (1993) is set out as Appendix A to this brief.[2]

As relevant here, Article 4 of the IAD provides that when a State lodges criminal charges against a prisoner in another State's custody, it may request transfer of the prisoner for purposes of criminal trial. Following designated procedures, the custodial State is then to send the prisoner to the receiving State. Article 4(c) provides:

> In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Article 6 of the IAD provides that the foregoing time period (and others in the IAD) are "tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter." If, however, the prisoner "is not brought to trial within the period provided in . . . article 4," the court "shall enter an order dismissing the [charges] with prejudice." Article 5(c).

Also relevant is the last sentence of 28 U.S.C. § 2243, which provides: "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

STATEMENT

Petitioner Orrin Scott Reed is a career criminal. Reed was convicted of Indiana charges of arson in 1954, grand larceny in 1960 and safe burglary in 1962. R. 15-16. He was later convicted of federal charges of bank robbery in 1967 and interstate transportation of stolen property and conspiracy in 1980. *Id.* While serving the most recent of his federal sentences at the federal penitentiary in Terre Haute, Indiana, he was charged in Fulton County, Indiana, with theft relating to a fraudulent insurance claim in which he reported a truck as stolen, when in fact it had been stripped and sold for parts at his salvage yard. R. 25.

1. Reed was transferred from federal custody under the IAD. To initiate this process, the prosecuting attorney sent a form entitled "Request for Temporary Custody" to the warden of the federal penitentiary, requesting that Reed be brought to Fulton County for trial. J.A. 4-6. According to the form, the prosecutor "propose[d] to bring this person to trial on this information within the time specified in Article 4(c) of the [IAD]." J.A. 5.

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[1] Respondents recognize that this position is inconsistent with a statement made in their Brief in Opposition to the Petition for Certiorari. *See* Brief in Opp. at 10. Nevertheless, because the point is jurisdictional, it cannot be waived, even by express stipulation. *Ahrens v. Clark*, 335 U.S. 188, 193 (1948) (declining to allow express waiver of limit on territorial jurisdiction to issue *habeas corpus*). Moreover, because of the importance of this jurisdictional point, respondents feel compelled to alert the Court to it.

[2] For the reasons stated in the Part I of the Argument *infra*, the federal version set forth in the appendix to Petitioner's Brief is *not* relevant to this case except to the extent that it shows that the United States is a party "State" under the Agreement and therefore honored Indiana's request for transfer.

Appended to the request was a certificate by the trial court that the prosecutor was an appropriate officer under the IAD, that the facts regarding the charge were correct, and transmitting the request "for action in accordance with its terms and the provisions of the Agreement on Detainers." J.A. 5-6. Nowhere does this certificate suggest that the trial court "certified compliance with the IAD," as petitioner repeatedly claims. *See* Pet. Br. at 7, 39-40.

Reed arrived in Fulton County to face the theft and habitual offender charges on April 27, 1983. R. 32, 36. Thus, the 120th calendar day after his arrival was August 25, 1983.

2. During the 120 days following his transfer, Reed filed no fewer than seven motions requesting dismissal of all charges. While some of these motions referred to the IAD, none mentioned Article 4(c), demanded trial within 120 days, or objected to either of the two trial dates which had been set for September, 1983. Reed's pretrial motions were pending before the Court in the aggregate for more than 90 days.

On May 4, 1983, just seven days after his arrival, Reed filed a "Petition for Writ of *Habeas Corpus*, and Dismissal of Charges," arguing that his transfer without a hearing was unlawful. J.A. 7-8. This motion was denied by the trial court on June 27, 1983, following a pretrial conference. J.A. 41.

Prior to the ruling on his May 4 motion, Reed filed three more motions, all entitled "Motion for Relief of Violations" and dated May 23, June 8 and June 20, 1983. R. 52-60; *see* J.A. 43-45. These motions repeated Reed's claim that he should have been afforded a pretransfer hearing under the IAD and cited case law. Reed also complained that his "illegal restraint" and restrictions at the county jail prevented him from meeting or telephoning witnesses. He requested that he be released to a federal halfway house so that he could prepare his defense. Following argument at the June 27, 1983, pretrial conference, at which Reed submitted yet another motion for dismissal,[3] these motions were taken under advisement. J.A. 35, 41.

On June 29, 1983, Reed filed another "Motion for Relief of Violations." J.A. 46-47. Specifically citing Articles 5(d) and 5(h) of the IAD, Reed claimed that "caring for" him under the IAD included haircuts and medical and dental care. On July 8, 1983, Reed filed yet another "Petition For Relief Of Violations Of State Local Confinement, Federal Law, And Motion To Dismiss All Charges." J.A. 48-50. Incorporating all of his prior motions, Reed reiterated his contentions that his confinement was unlawful and his ability to prepare a defense was impaired. The trial court denied the pending motions by a comprehensive order on July 15, 1983. J.A. 51-54.

On July 25, 1983, Reed filed another lengthy "Petition For Relief Of Violations" which repeated his previous such motions. J.A. 56, ¶¶ 1-2. Without reference to specific time limits or provisions of the IAD, Reed also requested trial "within the legal guidelines of the Agreement on Detainer Act . . . by which the State of Indiana is in violation, (see first motion filed before court) and is forcing petitioner to be tried beyond the limits of the Agreement on Detainer Act." J.A. 56, ¶ 4. Reed referred to his previous and pending requests for dismissal, "and requests no extension of time be granted beyond those guidelines." *Id.* Reed charged the court with a

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[3]This "motion" was a copy of a filing Reed had made in federal court in Terre Haute, demanding a pretransfer hearing. J.A. 28-31. When the trial court inquired why it was necessary to file a federal court pleading in the state court, Reed responded that it was "vitally important" that it be filed immediately because of his understanding that failure to do so would result in a waiver of his rights under the IAD. J.A. 27-29. The trial court treated this submission as an oral motion to dismiss, supplemented by the federal court filing. J.A. 41; *see also* J.A. 31-32. When asked if an immediate ruling was necessary, Reed answered, "No, I don't think there is any necessity for you to rule on that right at this time." J.A. 31.

three-month delay which he claimed had caused irreparable damage. J.A. 56-57. He again requested proper "care" in the jail under the IAD. J.A. 57-58.

On August 1, 1983, at a pretrial conference, Reed filed yet another petition seeking relief from "violations" of the IAD. J.A. 87. The motion renewed Reed's prior motions to dismiss and complained of lack of access to witnesses. The motion claimed the alleged "violations" would result in an unfair trial and referred vaguely to "the limited time left for trial within the laws." J.A. 88.[4] Following argument (in which Reed renewed his original contention that the lack of a pretransfer hearing at the federal penitentiary voided his transfer and required dismissal, but said nothing about the time for trial or the 120-day provision, J.A. 67-74), the trial court took the motions under advisement. The motions were denied by the trial court following another pretrial conference on September 13, 1983. R. 444-45.

Reed did not specifically mention the 120-day time limit of Article 4(c) of the IAD, or even cite that provision, in any of the foregoing motions or in argument concerning them. Nor did he object on the two separate occasions during that time period when the trial court established trial dates for after August 25. Instead, as noted above, the motions consisted largely of claims that he was entitled to a pretransfer hearing and complaints that he was unable to prepare a defense from jail, a disability that could be lifted if he were able to post bond after his federal sentence expired.

3. At the several hearings when trial dates were set or estimated for dates after August 25, Reed made no objection. Thus, at an initial hearing on May 9, 1983, where the court

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[4]In a motion requesting deposition subpoenas, Reed requested that deposition "appointments" be set and the subpoenas issued "as soon as possible due to approaching trial date and Detainer Act time limits." J.A. 91.

advised Reed of his trial rights, including his right under Indiana law to be tried within 140 days under Indiana procedural rules, J.A. 16, Reed asked for an estimate of when the trial would take place "without anyone's asking for continuances or extensions of time." The court replied, "August, perhaps September." J.A. 20. Although the 120th calendar day from Reed's arrival in Fulton County would occur on August 25, 1983, Reed said nothing to indicate that the proposed trial date was in any way unsatisfactory. To the contrary, Reed informed the court that he was scheduled to be discharged from federal custody in August. *Id.*

At the June 27, 1983, pretrial conference, the court raised the issue of a trial date. The State estimated that its case would take three or four days; Reed said he might call 15 witnesses which could take three days. J.A. 33-35. The court stated:

> I'm going to tentatively select September 13 as trial date and I anticipate six days at least for trial. I may very well hold two weeks. I recognize that we've been dealing with an August release date for you, Mr. Scott [*sic*]. The calendar is in such a condition that I do not have that kind of time available until the second week of September and then I've two weeks together that I can devote as much as is required for this.

J.A. 36. Reed remarked that he should be released two weeks before the September 13 trial date, unless he lost "good time" credit on his federal sentence, in which event he would still be eligible for parole on September 14. J.A. 39. Although September 13 would be the 139th day after his arrival in Fulton County, again Reed made no objection of any kind to the trial date, but suggested that his release to a halfway house would solve his problems. R. 369-70. The discussion, in context, seems to indicate Reed's preference for trial after he had become eligible for bond.

The next pretrial conference was held on August 1, 1983. Reed orally moved that bond be set, pointing out his imminent release from federal custody. J.A. 76-79. The court set bond in the amount of $25,000.00 conditioned on Reed's discharge from any other sentence of incarceration. J.A. 79-80. Finally, due to a "substantial conflict," the court reset the trial to begin six days later than originally set, on September 19, 1983. R. 81. Again, Reed did not object.

4. Even though Reed had repeatedly suggested that he would be better able to prepare for trial if released on bond, he moved to dismiss the charges on the 124th day after his arrival, immediately after he became eligible for bond because his federal sentence had expired. J.A. 94. The trial court, finding that Reed had waived his claim by failing to make the court aware of the time limit and failing to object to trial settings beyond the 120th day, denied the motion. J.A. 113-14.

On the morning of the date set for trial, Reed filed a motion for continuance on the ground that obstacles to his preparation for trial required a delay "in order to have a fair and meaningful trial." J.A. 128. The motion was rendered moot by the publication, two days before trial, of a local newspaper article that mentioned Reed's prior criminal record, prompting the court to offer Reed the alternative of a continuance to avoid any possible prejudice. J.A. 131-39. Given the choices of starting the trial, waiting one or two weeks, or waiting one or two months, Reed picked the third. J.A. 134, 141-42, 144. He explained that this would give him additional time to interview witnesses and that a civil suit he had filed against the trial judge in federal court might be completed by then. J.A. 141-42.

Reed was released on bond on September 28, 1983. J.A. 148. Trial began on October 18, 1983. J.A. 148. Reed was convicted and, in a separate proceeding, was found to be a habitual offender. J.A. 150. This latter finding added a

period of 30 years to his sentence. J.A. 2; *see* Ind. Code § 35-50-2-8.[5]

5. On direct appeal Reed asserted that the charges should have been dismissed for violation of the IAD's 120-day time limit.[6] The Indiana Supreme Court affirmed the conviction, holding *inter alia* that Reed had waived the IAD 120-day claim by failing to object to the setting of trial dates beyond that time limit and by filing motions indicating that he intended to proceed to the trial as scheduled. *Reed v. State*, 491 N.E.2d 182, 185 (Ind. 1986). The issue was raised again in a state post-conviction petition and on appeal from the denial of that petition, but the Indiana Supreme Court's holding was found to be *res judicata*. J.A. 169-73, 182.

6. Reed then sought a writ of *habeas corpus* from the United States District Court for the Northern District of Indiana. The district court denied the petition on the merits. The court reviewed the details of the state court motions and hearings and concluded that "a significant amount of the delay of trial is attributable to the many motions filed either by the petitioner or filed on the petitioner's behalf." J.A. 195. The court also held, pursuant to circuit precedent, that the IAD's tolling provision applies to "all those periods of delay occasioned by. . . motions filed on behalf of the defendant."

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[5]The petitioner is not so likely to die in prison as he asserts. Pet. Br. at 8. Under Indiana's day-for-day sentence credit system, *see* Ind. Code § 35-50-6-3, Reed is currently scheduled to be released on parole in June 2000, before his 69th birthday.

[6]Reed did *not* argue that his Sixth Amendment right to a speedy trial was violated, nor did he argue that he suffered any specific prejudice as a result of the delay. *O. Scott Reed v. State of Indiana*, Ind. Sup. Ct. No. 484 S 143, Appellant's Brief 1-2, 13-17 (filed in district court as a separate exhibit and marked by the court of appeals as Volume 9 of 20). Similarly, at no point in state post-conviction proceedings did Reed make a Sixth Amendment speedy trial claim. On *habeas* the district court also noted that Reed made no constitutional claim that he was denied a speedy trial. J.A. 197-98.

J.A. 196 (citing and quoting from three Seventh Circuit cases).

7. The court of appeals for the Seventh Circuit affirmed on the ground that federal *habeas* relief should not be granted based on an alleged violation of the IAD where, as here, the petitioner had a full and a fair opportunity to present the claim in the state courts. *Reed v. Clark*, 984 F.2d 209 (7th Cir. 1993) (J.A. 199-211). In analyzing the issue, the court of appeals noted that the outcome of the case was not changed by the alleged failure to try Reed within 120 days: "Reed does not contend that vital evidence fell into the prosecutor's hands (or slipped through his own fingers) between August 26 and September 19, 1983." 984 F.2d at 212 (J.A. 208). Rehearing *en banc* was denied, J.A. 212, and this Court granted certiorari. 114 S. Ct. 437 (1993).

SUMMARY OF THE ARGUMENT

Because the IAD is a voluntary agreement entered into by several States, rather than a federally imposed obligation, federal *habeas corpus* relief is unavailable for several reasons.

I. There is no federal *habeas corpus* jurisdiction over petitioner's claim because the IAD simply is not a "law[] . . . of the United States" within the meaning of the statutes granting *habeas* jurisdiction to the district courts, 28 U.S.C. §§ 2241, 2254. As this Court has held in cases from a variety of contexts, the term "laws of the United States" means national laws imposing federal obligations. The IAD, as a voluntary agreement among the States, does not fall within this definition. Moreover, statutory terms such as those in the grant of *habeas* jurisdiction derive their meaning from the purpose of the statutes in which they are used. The purpose of the statutes granting federal *habeas* jurisdiction over state prisoners was, as this Court has noted, to provide an alternative means of enforcing federal constitutional and statutory rights created in the wake of the Civil War. Again, the IAD does not represent a federally imposed obligation of

any sort, and therefore does not fall within the jurisdictional grant. Indeed, in the respects that are important for federal *habeas corpus*, such agreements are more like state law than federal law, and it would therefore be inconsistent with established principles of federalism to premise *habeas corpus* relief on such agreements.

While the Court has held that interstate compacts present questions of federal law for this Court, those cases are not dispositive of the jurisdictional issue under the *habeas* statutes. The reasons this Court retains power to resolve disputes over the meaning of such compacts in accordance with principles of "federal common law" are rooted in the pragmatic fact that neither state courts nor state law can provide definitive answers to such questions. These reasons are wholly unrelated to the purposes of the federal *habeas* statutes, and do not therefore dispose of the question.

II. Even if petitioner's claim fell within the technical terms of the jurisdictional statutes, this Court should for prudential reasons hold collateral relief unavailable for IAD claims in accordance with the principles of *Stone v. Powell*, 428 U.S. 465 (1976). Both the essentially nonfederal nature of its provisions and the fact that it applies to such a small class of defendants belie any claim that the IAD is a federal guarantee that is essential to a fair trial. Thus, the IAD stands in marked contrast to the right to counsel, the right to be convicted only on constitutionally sufficient evidence, the right to proceedings untainted by racial discrimination, and freedom from police coercion — guarantees that this Court has held are not subject to *Stone's* analysis. Neither fundamental fairness, nor any other federal policy, would be materially enhanced by permitting collateral review of state court determinations under the IAD.

On the other hand, important values of finality and federalism would be materially impaired by permitting such review. The tensions that exist any time a federal court

reviews a state criminal conviction are exacerbated by the fact that the federal *habeas* court would be enforcing what is, for *habeas* purposes, essentially a state law. Moreover, the flexible and fact-specific nature of the IAD's governing rules would serve to make such federal review especially intrusive and at the same time most frequently fruitless.

Finally, in contrast to other claims this Court has held not subject to *Stone*, IAD claims cannot readily be recast as constitutional ones, despite petitioner's suggestion to the contrary, because there is such a yawning gulf between the standards this Court has established for constitutional speedy trial claims and the technical rules of the IAD. Thus, a rule precluding federal collateral relief would create real benefits in terms of conservation of scarce federal judicial resources.

III. Even if claims such as petitioner's could be reviewed on federal *habeas corpus* at all, they would remain subject to the "fundamental defect" and "complete miscarriage of justice" standard this Court has consistently applied to collateral review of nonconstitutional claims. The standard, at a minimum, requires a case-specific showing of prejudice, something petitioner is unable to provide.

IV. Finally, even if the Court holds that IAD claims are cognizable on federal *habeas corpus* review, it should decline petitioner's invitation to address the merits of his IAD claims, because those issues were not addressed by the court below and are not fairly encompassed in this Court's grant of certiorari.

ARGUMENT

I. THE IAD IS NOT A "LAW OF THE UNITED STATES" WITHIN THE MEANING OF THE *HABEAS CORPUS* STATUTES AND THEREFORE THE FEDERAL COURTS ARE WITHOUT JURISDICTION TO GRANT *HABEAS CORPUS* RELIEF BASED ON ALLEGED VIOLATIONS OF THE IAD.

Since 1867, when Congress first extended the federal courts' *habeas corpus* power to cover state prisoners, it has consistently provided that the writ may issue only where the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241; 2254. That limit is jurisdictional. As this Court held in *Carfer v. Caldwell*, 200 U.S. 293, 296 (1906), "The jurisdiction of courts of the United States to issue writs of *habeas corpus* is limited to cases of persons alleged to be restrained of their liberty in violation of the Constitution or of some law or treaty of the United States, and cases arising under the law of nations." *See also Matters v. Ryan*, 249 U.S. 375, 377 (1919). Here, of course, there is no claim that petitioner's custody violates either the Constitution or any treaty of the United States. Thus, the question is whether the IAD, an agreement voluntarily entered into by some States, is a "law of the United States" within the meaning of the provision. The answer is no.

As shown below, this Court has held in a variety of contexts that the term "laws of the United States" denotes national legislation enacted by Congress that imposes federal obligations. Plainly, an interstate agreement like the IAD, that the States have voluntarily entered and that does not even apply to all States, is not such a law. At the outset, as a textual matter, this construction is particularly natural in a provision such as § 2254 that requires an actual "violation of" one of the three forms of formally promulgated federal law,

i.e., the "Constitution or laws or treaties of the United States." Indeed, it would be difficult to read the term "laws of the United States" as encompassing any provision whose interpretation presents a federal question, as petitioner seems to suggest, without rendering much of the jurisdictional statute surplusage. That construction is by the purposes of the *habeas* statutes.

In the context of the *habeas* statutes, this Court has specifically held that a territorial Act, something that would normally be considered a matter of federal law, was not a "law of the United States." *Matter of Moran*, 203 U.S. 96, 104 (1906). Similarly, in *People v. Rupert Hermanos, Inc.*, 309 U.S. 543 (1940), this Court held that territorial legislation, even though enacted by Congress, was not a "law of the United States" for purposes of a statutory provision vesting the federal district courts with exclusive jurisdiction of all suits "for penalties and forfeitures incurred under the laws of the United States." 309 U.S. at 549-50. And this Court held repeatedly that legislation enacted by Congress for the District of Columbia did not amount to a "law of the United States" within the meaning of statutory provisions governing this Court's appellate jurisdiction. *E.g., American Security & Trust Co. v. District of Columbia*, 224 U.S. 491 (1912); *see also Washington, Alexandria, & Mt. Vernon Railway Co.*, 236 U.S. 190, 192 (1915) (treating as "not open to controversy" the proposition that the term embraces "only laws of the United States of general operation" and therefore does not include legislation local to the District; collecting cases); *accord Key v. Doyle*, 434 U.S. 59 (1977) (legislation passed by Congress for the District was not a "statute of the United States" for purposes of similar provision).

A proper analysis of the issue requires the recognition that "[w]hether a law passed by Congress is a 'law of the United States' depends on the meaning given to that phrase by its context." *Hermanos*, 309 U.S. at 549. Thus, in *American Security & Trust*, this Court unanimously noted

that although there was "no doubt that [congressional legislation for the District of Columbia] was, in one sense, a law of the United States . . ., it needs no authority to show that the same phrase may have different meanings in different connections." 224 U.S. at 494. *Accord, e.g., SEC v. National Securities, Inc.*, 393 U.S. 453, 466 (1969) (statutory terms must be interpreted in light of statutory purpose "[w]hatever these or similar terms may mean" in other contexts).

When the purpose of federal *habeas corpus* jurisdiction is brought into focus, it is clear that an interstate agreement voluntarily entered into by some States is not a "law of the United States" within the meaning of the *habeas* statutes. In *Fay v. Noia*, 372 U.S. 391 (1963), this Court extensively canvassed the history and purpose of the 1867 Act extending the federal courts' *habeas* power to cover state prisoners. Key to the Court's analysis was the recognition that the statute must be "viewed against the background of post-Civil War efforts in Congress to deal severely with the States of the former Confederacy." 372 U.S. at 415. The Court noted that "Congress was anticipating resistance to its Reconstruction measures and planning the implementation of the post-war constitutional Amendments" and concluded that "the measure that became the Act of 1867 seems plainly to have been designed to furnish a method additional to and independent of direct Supreme Court review of state court decisions for the vindication of the new constitutional guarantees." 372 U.S. at 415-16. Whatever else may be disputed about the history and purpose of federal *habeas corpus* jurisdiction, it cannot be gainsaid that the statute was designed to enforce *federally imposed obligations*, whether contained in the federal constitution or in federal statutes passed to implement constitutional provisions. The *habeas corpus* statutes were *not* designed as a mechanism to enforce obligations that the

States assumed in the exercise of their own lawmaking powers.[7]

The IAD simply does not represent such a federally imposed obligation. While petitioner's brief is replete with statements reflecting the assumption that Congress imposed the IAD upon the States when it adopted the IAD Act, that assumption is both historically and legally wrong. The initiative for the IAD came from the state governments themselves. *See United States v. Mauro*, 436 U.S. 340, 349-51 (1978). The States began adopting and enforcing the IAD long before Congress entered it on behalf of the United States and the District of Columbia as parties. *See* Appendix B; H. R. Rep. No. 91-1018, 91st Cong., 2d Sess. (1970), at 3 (noting that, as of the time Congress was considering the IAD, 25 states had adopted it); S. Rep. No. 91-1356, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Adm. News at 4864, 4866 (same). The legislative history

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[7]*Fay*'s historical analysis has been strongly criticized from the outset for its alleged failure to give effect to Congress' understanding that the writ of *habeas corpus* was limited in scope to jurisdictional issues. *See Fay*, 372 U.S. 853-61 (Harlan, J., dissenting); Oaks, *Legal History in the High Court — Habeas Corpus*, 64 MICH. L. REV. 450 (1966); Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 30 (1965); *cf.* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (pre-*Fay* analysis reaching essentially the same conclusion). While the core doctrine of *Fay* — that a federal *habeas* court has jurisdiction to review federal constitutional claims that have been considered and rejected by the state courts — has essentially been regarded by this Court as settled, the controversy over whether *Fay*'s reading of history and legislative intent was correct has never entirely subsided and echoes throughout the Court's *habeas corpus* jurisprudence. *See, e.g., Wright v. West*, 112 S. Ct. 2482 (1992) (multiple opinions); *Schneckloth v. Bustamonte*, 412 U.S. 218, 250-75 (1973) (Powell, J., concurring). The Court need not revisit that controversy in this case, however, because even at its broadest, *Fay* stands for no more than the proposition that *habeas corpus* is available to enforce federally imposed obligations.

also demonstrates that Congress was merely entering into the IAD on behalf of the United States and the District of Columbia, not imposing new federal obligations upon the States. *See* 116 Cong. Rec. 14,000 (May 4, 1970) (remarks of Rep. Poff); 116 Cong. Rec. 38,840 (November 25, 1970) (remarks of Senator Hruska); *accord* H. R. Rep. No. 91-1018, *supra*, at 3; S. Rep. No. 91-1356, *supra*, 1970 U.S. Code Cong. & Adm. News at 4866.

Moreover, a State's participation in the IAD is wholly optional and voluntary. *See* Article 8 (IAD does not become effective as to a State until the State has enacted it into law, and a State can withdraw from IAD by repealing the statute that does so). Indeed, as petitioner acknowledges, two States have chosen not to join the IAD at all, Pet. Br. at 24 n.12, and some jurisdictions, in enacting it into law, have adopted individual variations. *See State v. Seadin*, 593 P.2d 451, 453 (Mont. 1979) (noting that Montana time limit under Article 3 of the IAD required trial "at the next term of court" rather than within 180 days of a prisoner's request, as in most States).[8]

Thus, the IAD is more like state law than federal law in the respects that are relevant to the exercise of federal *habeas corpus* jurisdiction. Unlike the fundamental constitutional guarantees at issue in *Fay*, and unlike federal statutes imposed on the States by the Reconstruction Congress or subsequent Congresses, the IAD requires for its effectiveness the legislative consent of the State in question, a consent that can be revoked at any time. To predicate federal *habeas corpus*

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[8]Indeed, in 1988, Congress enacted an amendment to its own adoption of the IAD, indicating that, where the United States is a receiving "state," its failure to honor the time limits of the IAD will not necessarily result in a dismissal of the charges with prejudice. 18 U.S.C. app. § 9 (quoted in Appendix to Petitioner's Brief at 11a-12a). The same section of the federal Act also effectively exempts the federal government from the so-called "anti-shuttling" provisions of the IAD.

relief on such an exercise of the States' lawmaking power would do violence to principles of federalism this Court has recognized. *Cf. Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984) ("A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").

Nor are this Court's cases asserting its power to construe interstate compacts to the contrary. Just as it has done with territorial legislation, this Court has also held that interstate compacts may constitute federal law for some purposes but not others. Thus, Justice Brandeis, writing for the Court in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), held that an interstate compact was not a "treaty or statute of the United States" within the meaning of former section 237(a) of the Judicial Code (28 U.S.C. § 344 (1935 ed.)), which set forth the Court's appeal jurisdiction, but nonetheless held that a claim under such a compact fell within the Court's certiorari jurisdiction under former section 237(b). 304 U.S. at 109-10. Two years later, the Court further explained that "construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal 'title, right, privilege, or immunity' which when 'specially set up or claimed' in a state court may be reviewed here on certiorari under § 237(b) of the Judicial Code." *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U.S. 419, 427-28 (1940) (citing *Hinderlider*, among other cases, as support).[9]

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[9]In light of *Delaware River's* reliance upon *Hinderlider*, there can be no suggestion that *Delaware River* is somehow inconsistent with *Hinderlider*. *Accord Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 279 n.5 (1959) (also continuing to treat *Hinderlider* as good law); *cf. Cuyler v. Adams*, 449 U.S. 433, 439 n.7 (1981).

The construction of interstate agreements presents a question of federal law for ultimate resolution by this Court because of the compelling need for a neutral forum and source of law to govern agreements between coequal States. *See State ex rel. Dyer v. Sims*, 341 U.S. 22 (1951):

> "Where the States themselves are before this Court for the determination of a controversy between them, neither can determine their rights *inter sese*, and this Court must pass upon every question essential to such a determination, although local legislation and questions of state authorization may be involved. A decision in the present instance by the state court would not determine the controversy here."

341 U.S. at 29 (quoting *Kentucky v. Indiana*, 281 U.S. 163, 176-77 (1930); internal citation omitted). These reasons, are, of course, the same reasons that "federal common law" provides the rule of decision in controversies between States under this Court's original jurisdiction. *State ex rel. Dyer v. Sims*, 341 U.S. at 26-27 ("This Court decides such controversies according to 'principles it must have the power to declare.'") (quoting *Missouri v. Illinois*, 200 U.S. 496, 519 (1906)).

More importantly, the rationale of these cases has nothing to do with the reasons for which Congress extended the federal *habeas* power to cover state prisoners. As the Court noted in *Fay*, the *habeas* power is a method for effective federal enforcement of fundamental federal rights at the *case-specific* level that is necessary for those rights to be extended to all within their protection. The need to resolve disputes between States over the meaning of interstate agreements is of a different character, and is precisely the sort

of task for which *this* Court's original and certiorari jurisdiction were designed. While it could be argued that the Court adopted an overly expansive reading of its own jurisdictional statutes in the Compact Clause cases, no one could dispute the pragmatic concerns underlying such an expansive reading. However, those pragmatic concerns provide no justification for applying those cases uncritically to the *habeas* statutes, which were designed for wholly different purposes.

Although there is language in both *Cuyler v. Adams*, 449 U.S. 433 (1981), and *Carchman v. Nash*, 473 U.S. 716 (1985), tending to suggest a contrary result, neither case squarely addressed the question of whether the IAD is one of the "laws of the United States" within the meaning of the *habeas* statutes. *Cuyler* involved a claimed violation of the Due Process and Equal Protection Clauses in the context of a suit brought under 42 U.S.C. § 1983, 449 U.S. at 436-37, and thus the jurisdiction of the federal courts over the claim was never in question. The IAD was simply construed to avoid the constitutional questions. *Id.* at 437. *Carchman*, while brought under 28 U.S.C. § 2254, was resolved by virtue of this Court's holding that the IAD did not apply to probation revocation proceedings, and, other than the reiteration of the holding in *Cuyler*, contained no discussion of the federal nature of the IAD. *See* 473 U.S. at 719. While this determination of the "merits" of the IAD claim might be argued to be an "implicit" holding that the *habeas* court had jurisdiction, this Court has steadfastly refused to treat cases in which a latent jurisdictional question was not discussed as dispositive of the issue. *E.g., Pennhurst*, 465 U.S. at 119 ("'[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.'") (quoting *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974)); *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).

This Court, of course, retains jurisdiction to resolve disputes over the meaning of the IAD on certiorari or, if the dispute is between party states, in an original action, just as it does with other interstate agreements. Such review is more than adequate to provide any needed "uniformity," something that exercises of federal *habeas* jurisdiction by lower courts is incapable of providing in any event. *See Lockhart v. Fretwell*, 113 S. Ct. 838, 846 (1993) (Thomas, J., concurring) (state courts are not bound by interpretations of federal law by lower federal courts).

However, none of this Court's decisions can be fairly read to hold that a State's alleged failure to satisfy the terms of an agreement voluntarily entered into, and in which its participation can be terminated at any time, constitutes a violation of the "laws of the United States" so as to provide the jurisdictional prerequisite for federal *habeas corpus* relief. For the reasons stated above, this Court should decline to do so now.

II. UNDER *STONE v. POWELL*, FEDERAL HABEAS RELIEF SHOULD NOT BE AVAILABLE FOR PETITIONER'S IAD CLAIM.

Even if petitioner's claim comes within the technical reach of federal *habeas corpus* jurisdiction, it is nevertheless not an appropriate ground on which to grant collateral relief. *Stone v. Powell*, 428 U.S. 465 (1976), established the framework for considering limitations on the availability of collateral relief on *habeas* and held that such relief is unavailable for alleged violations of the Fourth Amendment's exclusionary rule where there are adequate processes for review of such claims in the state courts. A similar conclusion is even more strongly warranted for petitioner's IAD claim.

A federal *habeas corpus* action is an exception to the normal rule requiring federal courts to recognize the finality of, and give full faith and credit to, state court judgments. *See* 28 U.S.C. § 1738. This exception is not only limited to a

narrow class of federal claims but also is wholly discretionary: the federal *habeas* statute does not command relief, but merely *permits* relief as "law and justice require." 28 U.S.C. § 2243; *see also* 28 U.S.C. § 2241 ("Writs of habeas corpus *may* be granted . . . .") (emphasis added); *Withrow v. Williams*, 113 S. Ct. 1745, 1750 (1993); *Stone*, 428 U.S. at 478 n.11. That discretion, of course, must be exercised based on sound equitable principles, consistent with the historically developed role of federal *habeas corpus* as a tool for vindicating federal rights that are fundamental to a fair trial while respecting the interests of finality and federalism. *See Fay v. Noia*, 372 U.S. 391, 438 (1963) ("habeas corpus has traditionally been regarded as governed by equitable principles"); *see also Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1718-20 (1992); *id.* at 1722-24 (O'Connor, J., dissenting); *Coleman v. Thompson*, 111 S. Ct. 2546, 2562-65 (1991); *McCleskey v. Zant*, 499 U.S. 467, 490-92 (1991); *Butler v. McKellar*, 494 U.S. 407, 412-14 (1990); *Teague v. Lane*, 489 U.S. 288, 308-10 (1989); *Wainwright v. Sykes*, 433 U.S. 72, 88 (1977).

In *Stone v. Powell*, this Court exercised that discretion and concluded that an asserted violation of the Fourth Amendment's exclusionary rule should not give rise to federal *habeas* relief if the petitioner had a full and fair opportunity to litigate his claim in the state courts. On one side of the ledger, the Court explained, was the unusual nature of the right: violation of the exclusionary rule does not abrogate a constitutional right related to the soundness of the criminal trial. Rather, the rule is intended to deter future violations of the Fourth Amendment, and that purpose would only be marginally advanced by *habeas* review. *Stone*, 428 U.S. at 486; *Withrow*, 113 S. Ct. at 1750. On the other side of the ledger was the comparatively high cost of collateral review of such claims: reliable evidence is excluded; and systemic interests in judicial efficiency, finality, and federalism are impaired. *Stone*, 428 U.S. at 490-93; *Withrow*, 113 S. Ct. at

1750. Thus, the Court concluded this balance required a rule denying collateral review by a federal *habeas* court. *Stone*, 428 U.S. at 494.

The Court has continued to apply this framework in various cases since *Stone*, most recently in *Withrow*. In each case where the Court found *habeas* relief to be available, the Court stressed that the right at stake was one that was considered necessary to a constitutionally fair and reliable trial. Thus, in *Withrow*, the Court explained that the Fifth Amendment "embodies 'principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle.'" *Id.* at 1753 (quoting *Bram v. United States*, 168 U.S. 532, 544 (1897)). The Court also emphasized that the Fifth Amendment right protected by *Miranda v. Arizona*, 384 U.S. 436 (1966), does not "serve some value necessarily divorced from the correct ascertainment of guilt." *Id.* at 1753.

This same reasoning formed the basis of the Court's decision in *Kimmelman v. Morrison*, 477 U.S. 365 (1986). There, the Court found that the "right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process. The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Id.* at 374 (citations omitted).

Likewise, in *Rose v. Mitchell*, 443 U.S. 545 (1979), the Court stressed that an alleged violation of the Fourteenth Amendment's right against racial discrimination in the selection of members of a grand jury "brings the integrity of the judicial system into direct question," *id.* at 563, and "strikes at the fundamental values of our judicial system and

our society as a whole," *id.* at 556.[10] And, in *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court found that the "question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence." *Id.* at 323.

As each of these cases establish, what is critical is whether the costs of second-guessing final state-court adjudications by federal district courts are justified by a need to protect federal rights that are fundamental to a fair trial.

Judged by these standards, petitioner's IAD claim falls far short. Indeed, it is an even more starkly inappropriate basis for *habeas* relief than the Fourth Amendment claim at issue in *Stone*. Petitioner's claim does not rest on a constitutional right or a judicially developed doctrine designed to protect such a right, as did each of this Court's decisions distinguishing *Stone*. In fact, petitioner's claim does not even rest on a *statutory* command prescribing minimum federal fair-trial guarantees. Rather, the duty petitioner seeks to enforce was voluntarily assumed by Indiana in agreement with other States, not imposed by the federal sovereign. In addition, that agreement applies only to a tiny proportion of state criminal defendants — those transferred from the custody of a different jurisdiction — a circumstance having no relation to the fairness of the criminal trial. Thus the IAD, far from prescribing necessary elements for a fair trial, merely serves the prosecutorial and penal interests of the *States* who are parties to the agreement — interests that are unrelated to the fairness of the trial. This type of claim is a uniquely

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[10] Also important in *Rose* was the unique place that the Fourteenth Amendment's Equal Protection Clause — particularly its core ban on race discrimination — holds in the Court's *habeas* jurisprudence. As the Court noted, collateral review of race discrimination claims would not raise new federal-state tensions because federal courts had been granting such relief for nearly a century. *Id.* at 562.

inappropriate basis for the discretionary exercise of federal *habeas corpus* power.

A. Petitioner's IAD Claim Does Not Involve Federal Guarantees Fundamental To A Fair Trial.

Several features of the IAD confirm that, like the exclusionary rule at issue in *Stone* and unlike the constitutional rights at issue in the decisions distinguishing *Stone*, the 120-day time limit of the IAD cannot sensibly be understood as a fundamental federal right that has anything to do with reliability of the outcome or the integrity of the process. First, the IAD is categorically different from the measures considered in the Court's *Stone-Withrow* line of cases because it embodies obligations voluntarily assumed by States, not imposed on States by federal statute or constitutional provision.

Moreover, given the voluntary nature of the IAD, it cannot reasonably be viewed as representing any minimum federal standards for the fair trial of state criminal defendants. Violations of obligations voluntarily assumed by States, in the form of ordinary state legislation or state constitutional provisions, are not proper bases for federal *habeas* relief, no matter how unmistakable the violation. 28 U.S.C. § 2254; *Estelle v. McGuire*, 112 S. Ct. 475, 480 & n.2 (1991). In terms of the core purposes of federal *habeas corpus*, a violation of the IAD is no different: it does not represent a guarantee that federal lawmakers or constitution framers have deemed essential for a valid conviction, much less one so essential as to demand access to a federal forum outside the normal channels of direct appeal.

It is a peculiar kind of "federal" guarantee that States can freely avoid by refusal to join the agreement in the first place or voluntary withdrawal. Yet that is precisely the status of the IAD. *See supra* at 17. Indeed, it is a peculiar kind federal guarantee that is wholly inapplicable to defendants in

some States — at present, in Mississippi and Louisiana; at earlier times, in many other States. *See* Appendix B.

Not only can States decline to sign on, but even within a State, most defendants are not covered by the IAD. The 120-day time limit applies only to defendants transferred from the custody of another jurisdiction under Article 4. Wholly unaffected by Article 4(c) of the IAD are defendants not in custody at the time of trial, defendants in custody elsewhere in the same jurisdiction, and defendants transferred under Article 3. It cannot seriously be said that a trial beyond 120 days has been federally determined to be less fair and reliable when almost no state defendant can invoke such a 120-day rule. And what distinguishes transferees from all other state defendants — how they got in to the jurisdiction of the court — has nothing whatsoever to do with the fairness of their trials.

Similarly, the extraordinary flexibility of the 120-day rule, and the extraordinary harshness of the dismissal remedy, together make it an implausible source of rights fundamental to a fair trial. On the one hand, the trial court has the broadest possible discretion to authorize trials beyond the presumed 120 days: "for good cause shown in open court" the trial court may grant "any necessary and reasonable continuance." Article 4(c). The IAD also provides that the 120-day limit can be tolled while "the prisoner is unable to stand trial," Article 6(a), a provision that has been interpreted broadly to increase still further the discretion of the trial court. *See infra* at 41. On the other hand, the required remedy of dismissal *with prejudice* (Article 5(c)), forbidding a new trial regardless of the seriousness of the offense or the absence of prejudice to the defendant, is harsher than any remedy normally granted for violations of even the most fundamental constitutional rights.[11] In terms of the nature of

[11] In 1988, Congress specifically relaxed this remedial constraint for federal prosecutions, permitting dismissal *without* prejudice if the

the right and the authorized sanctions for its violation, the IAD provision invoked by petitioner is thus wholly out of line with the types of guarantees routinely considered in federal *habeas corpus*.

These features of the IAD not only show that it does not create a federal right that is fundamental to a fair trial, they simultaneously show that the 120-day rule serves to protect the interests of the *sending* State — a fact that is hardly surprising given that the IAD is an agreement among the several States. The IAD was developed in large part to provide an efficient and reliable means for transferring prisoners between jurisdictions. *See* Council of State Governments, Suggested State Legislation Program for 1957 ("Legislative Program") at 74-79. A central component of that purpose was the "assurance that any prisoner released to stand trial in another jurisdiction will be returned to the institution from which he was released. . . . Unless there is such assurance, many jurisdictions will understandably hesitate to cooperate." *Id.* at 75. *See also United States v. Mauro*, 436 U.S. 340, 350 (1978). This assurance finds expression, among other places, in Article 4(c)'s 120-day requirement. *See also* Article 5(e).

Article 4(c) also promotes the "expeditious and orderly disposition" of detainers, Article 1, a purpose the drafters viewed primarily as benefiting the participating States, not defendants. According to the drafters, when detainers remain outstanding "[t]he prison administrator is thwarted in his effort toward rehabilitation. . . . [The prisoner] often becomes embittered with continued institutionalization and the objective of the correctional system is defeated." Legislation Program, *supra* at 74. In addition, the drafters believed that

circumstances warrant. 18 U.S.C. app. § 9(1). To the extent that Congress has spoken about the nature of the IAD right, therefore, it has signalled its view of the relative *unimportance* of the right.

outstanding detainers adversely affect the State's interest in proper sentencing: "A rather long sentence may be indicated, but the judge hesitates to give such a sentence if the offender is going to serve subsequent sentences, or if he stands to lose the privilege of parole because of a detainer." *Id.*[12] Indeed, nothing in the language of the IAD or the literature of its drafters indicates that Article 4(c)'s purpose was to benefit defendants, much less establish a federal speedy trial right. Concomitantly, the 120-day rule is entirely unrelated to the integrity of the outcome or process of a criminal trial.[13]

Petitioner is simply wrong when he suggests that the fact that Congress adopted the IAD in response to this Court's decisions in *Smith v. Hooey*, 393 U.S. 374 (1969), and *Dickey v. Florida*, 398 U.S. 30 (1970), shows that Article 4(c) was intended to protect prisoners' constitutional speedy trial rights. Pet. Br. at 17. The IAD was drafted by the Council of State Governments and adopted in several States well over a decade before *Hooey* and *Dickey* were ever decided. *See* Appendix B. It is thus hardly remarkable that the literature of the drafters makes no reference to the constitutional speedy trial right. *See* Legislation Program, *supra*. Moreover, the congressional legislative history, to the extent that it is even relevant (it merely reflects Congress's decision to participate in the IAD, and sheds no light on the States' reasons for

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[12]Such rehabilitative opportunities in the sending State, once lost, cannot be regained, particularly as a result of collateral review when the prisoner is serving his new sentence in the receiving State. Thus, like the exclusionary rule in *Stone*, the primary purpose of the 120-day and its accompanying dismissal penalty is to deter future violations. As in *Stone*, the availability of collateral review to enforce the IAD serves that goal marginally, if at all.

[13]While Article 3 of the IAD may have been intended to benefit prisoners by allowing them the opportunity to request disposition of outstanding detainers, *see Carchman v. Nash*, 473 U.S. 716, 720-21 (1985), petitioner's claim is not based on Article 3. Thus Article 3's purpose is of no relevance here.

creating it or Indiana's reasons for adopting it), suggests that Congress' concern was to provide a procedure whereby federal prisoners could be transferred to state custody to *avoid* having convictions vacated or reversed, such as occurred in *Hooey* and *Dickey*. *See* S. Rep. No. 91-1356, *supra*, 1970 U.S. Code Cong. & Adm. News at 4864.

In any event, even if petitioner were correct that the IAD was adopted in part as a result of "speedy trial" concerns, those concerns related to the problem of prisoners who could not be tried by States because they were in federal custody (in *Hooey* and *Dickey*, the trials were delayed for seven and eight years, respectively, because the defendants were in custody). That problem, and provisions of the IAD that solved it, are not at issue here. It was the IAD's *mechanism of transfer*, as a practical matter, that solved *that* speedy trial problem. The Committee Report's discussion of the need to solve the problem in no way suggests that the 120-day rule was intended as some sort of prophylactic protection of Sixth Amendment rights.

Of equal importance, there is not only an enormous difference between a seven-year delay and a 121-day delay, but also between a Sixth Amendment violation and a technical violation of the 120-day rule. As explained below, trial after 120 days does not by itself create even a colorable Sixth Amendment claim under the standards of *Barker v. Wingo*, 407 U.S. 514 (1972), and its progeny. In short, petitioner has cited nothing to suggest that Congress linked the *120-day provision of Article 4(c)* with Sixth Amendment rights — something that would be quite surprising given the nature of the IAD provisions.

In this regard, contrary to petitioner's contention, Article 4(c) does "serve some value necessarily divorced from the correct ascertainment of guilt." *Withrow*, 113 S. Ct. at 1753. *See* Pet. Br. at 20-21. As explained above, Article 4(c) was designed to benefit the States by providing an efficient

method of transferring prisoners and assuring their return. While petitioner is correct that the *Sixth Amendment* speedy trial right enhances the truth-seeking process, it does not follow that a technical violation of the IAD's 120-day requirement would have any effect of constitutional significance. It cannot seriously be argued that a trial held 121 days following transfer would be any less sound than one held on day 120. Under petitioner's view, however, the prisoner who is tried on day 121 must be released from incarceration on that charge -- an outcome that would do no more than "serve mechanistic rules quite unrelated to justice in a particular case." *Schneckloth v. Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring).

B. The Institutional Costs of Federal Collateral Review of IAD Claims Are Considerable.

That the IAD is not a minimum federal guarantee that is fundamental to a fair trial is reason enough to deny petitioner's claim for *habeas* relief. That conclusion is only confirmed by considering the other side of the ledger. The costs of entertaining IAD claims are considerable.

Plainly, federal *habeas* review of an IAD claim arising out of a state court conviction would intrude on the interests of finality and federalism that are central to our federal system of criminal justice. These costs were sufficient to deny collateral review in *Stone*, 428 U.S. at 489-92, and as discussed above, the reasons arguing in favor of collateral review of IAD claims are even less compelling than the reasons that could be urged in support of such review for Fourth Amendment claims.

In addition, in light of the flexibility of the 120-day time limit, *habeas* review by a federal court would involve second-guessing of highly discretionary judgments by state-court judges. The federal court would have to examine whether the state-court judge had "good cause" to grant a continuance, whether the continuance was "reasonable" and whether the

defendant was "unable to stand trial." Article 4(c), Article 6(a), Ind. Code § 35-33-10-4. The deferential standard that a federal court would properly use to review these claims, *cf.* 28 U.S.C. § 2254(d), makes it unlikely that any errors would actually be found. Meanwhile, the federal courts will have engaged in a highly intrusive inquiry into what amounts to case management.

Moreover, denying review of IAD claims would benefit the federal courts in the exercise of their *habeas* jurisdiction. IAD claims necessarily involve fact-specific judgment calls due to the IAD's tolling and continuance provisions. And in contrast to the situation in *Withrow*, where the Court found as the "most important[]" reason for permitting collateral review the fact that "virtually all" *Miranda* claims could simply be recast as involuntariness claims under the Fifth and Fourteenth Amendments, 113 S. Ct. at 1754, IAD claims based on technical violations of the 120-day time limit cannot in any significant number of cases provide even a colorable foundation for Sixth Amendment speedy trial claims. In order to raise even a colorable claim under the Sixth Amendment, there must be a delay of years, not days. *See, e.g., Doggett v. United States*, 112 S. Ct. 2686 (1992) (eight-year delay); *Moore v. Arizona*, 414 U.S. 25 (1973) (three-year delay); *Barker*, 407 U.S. at 516-19 (five-year delay); *Dickey*, 398 U.S. 30 (1970) (eight-year delay); *Hooey*, 393 U.S. 374 (1969) (seven-year delay). Also, the Sixth Amendment takes substantial account of the reasons for the delay, *i.e.*, "whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result." *Doggett*, 112 S. Ct. at 2690. Thus, any Sixth Amendment claim by a defendant that rests on nothing more than an alleged violation of the 120-day rule would properly be dismissed as a matter of law without hesitation.

Thus, precluding collateral review of IAD claims would result in real savings of federal court resources. At the same

time, collateral review of IAD claims would at best only marginally advance what *petitioner* alleges to be the purpose of the 120-day rule — the protection of Sixth Amendment rights — and would not advance the most likely purpose of the provision at all. Virtually no IAD violations would rise to the level of a Sixth Amendment violation; and for those that do, the defendant need not rely on the IAD to seek *habeas* relief. Limiting review of IAD claims would thus not "seriously interfere with an accused's" Sixth Amendment rights. *Kimmelman*, 477 U.S. at 378. And collateral review would never be the only means through which a prisoner could raise a claim under the IAD. *Cf. Kimmelman*, 477 U.S. at 378. Prisoners can and do raise IAD claims on direct review with regularity, as petitioner did here, and State courts have not been shy about granting relief. *See* Annot. 98 A.L.R.3d 160 (1980).

The costs of *habeas* relief for IAD violations are particularly grave for another reason as well. *Habeas* relief would not result in the mere exclusion of evidence, as in *Stone*. Prisoners who were found guilty of crimes would be permanently set at liberty. This result is particularly troubling since, by definition, the IAD applies predominantly to *repeat offenders* — the class of prisoners who are uniformly understood to be the most menacing to society.

Nor is federal *habeas* review of IAD claims needed out of a concern that States either will not or cannot vigorously enforce the IAD. *Cf. Rose*, 443 U.S. at 561; *Kimmelman*, 477 U.S. at 378. Any State where a claim could arise would have enacted the IAD as its own state law, and would thus have no hostility toward its enforcement. The court of appeals observed that such voluntarily adopted laws are less likely to be objects of state court hostility than some constitutional rules. J.A. 204-05. This point seems especially applicable to the IAD because, given that other States' cooperation hinges on enforcement of the IAD, there are

additional incentives for state courts to comply, further reducing any need for collateral review.

Finally, awarding *habeas* relief for violations of the IAD produces a cost that is perhaps unique to interstate agreements. The more that traditional policies of finality and federalism are impinged upon by collateral relief for IAD violations and state resources are consumed by the burdens of litigating such collateral claims, the greater the incentive for States to opt out of participation in the IAD or to adopt modifications. *Habeas* relief for IAD claims thus could produce the perverse result of undermining the very policies served by the IAD.

All of this supports the conclusion that the proper standard for reviewing IAD claims is the *Stone* rule, rather than the standard used for non constitutional claims based on federal statutes. The Court recognized in *Stone* that non-constitutional claims are categorically different from constitutional claims, providing a proper basis for federal *habeas* relief only when the "alleged error constituted a fundamental defect which inherently results in a complete miscarriage of justice." 428 U.S. at 477 n.10. But a mere violation of the 120-day rule of the IAD's Article 4(c) could never, by itself, *inherently* result in a miscarriage of justice. A trial that commences 121 days (or 221 days) after transfer from custody could not be unjust simply because of the delay beyond 120 days. If some intervening circumstance caused a fundamental defect (if, *e.g.*, exculpatory evidence was lost on the 121st day) it would invariably be the intervening circumstance, rather than the IAD violation, that works the miscarriage. This particular nonconstitutional claim cannot "inherently" work a miscarriage. In any event, as shown in part III, *infra*, even if an IAD violation could *sometimes* result in a miscarriage of justice, at a minimum, case-specific prejudice is required to warrant *habeas* relief.

In sum, when the account is made up, the costs of federal collateral review of IAD violations far outweigh any possible marginal benefits. Accordingly, this Court should exercise its discretion under *Stone* to preclude such review.

III. FEDERAL *HABEAS CORPUS* RELIEF IS UNAVAILABLE BECAUSE PETITIONER CANNOT ESTABLISH A "FUNDAMENTAL DEFECT" RESULTING IN A "COMPLETE MISCARRIAGE OF JUSTICE."

Even if the IAD could properly support federal *habeas corpus* jurisdiction and was not subject to the rule of *Stone v. Powell*, petitioner still could not prevail under the normal standard of review for nonconstitutional claims under 28 U.S.C. § 2254. That standard requires that a petitioner show a "fundamental defect" in the trial which inherently resulted in a "complete miscarriage of justice." In order to satisfy that standard, a petitioner must, at a minimum, show actual prejudice to his right to a fair trial, something Reed has not even alleged.

As this Court held in *Hill v. United States*, 368 U.S. 424 (1962), an error "which is neither jurisdictional nor constitutional" cannot form the predicate for *habeas corpus* relief unless it is "a fundamental defect which inherently results in a complete miscarriage of justice." 368 U.S. at 428. Similarly, the Court in *Davis v. United States*, 417 U.S. 333 (1974), while granting relief, reaffirmed *Hill*'s fundamental defect standard, finding that a conviction for an act that the law does not make criminal "inherently results in a complete miscarriage of justice" under *Hill*. 417 U.S. at 346-47. The Court was careful to point out that collateral review does not reach "every asserted error of law." *Id.* at 346. The Court has reiterated this standard time and again. *E.g., United States v. Addonizio*, 442 U.S. 178, 185 (1979); *United States v. Timmreck*, 441 U.S. 780, 783 (1979); *Stone*, 428 U.S. at 478 n.10. Notably, *Davis* is apparently the only decision of

this Court to authorize *habeas* relief based upon a nonconstitutional claim, and even there, the circumstances were truly extraordinary, as the petitioner was imprisoned for conduct that the court of appeals later determined was not even a crime.

Petitioner's claim that § 2254 claims should be reviewed more stringently than § 2255 claims is meritless.[14] The same standard applies to nonconstitutional claims under both 28 U.S.C. § 2254 and § 2255. This Court specifically stated as much in *Stone*, 428 U.S. at 447 n.10, and when this Court formulated the fundamental defect standard in *Hill*, it relied on pre-§ 2255 *habeas corpus* cases for authority. 368 U.S. at 428 (citing *Bowen v. Johnston*, 306 U.S. 19, 27 (1939); *Escoe v. Zerbst*, 295 U.S. 490 (1935); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Walker v. Johnston*, 312 U.S. 275 (1941); and *Waley v. Johnston*, 316 U.S. 101 (1942)). When the Court later applied the same standard in *Timmreck* and *Addonizio* (both § 2255 cases), it expressly relied on § 2254 cases. *Addonizio*, 442 U.S. at 184 n.11; *Timmreck*, 441 U.S. at 784 n.4 (both citing *Stone v. Powell* and *Henderson v. Kibbe*, 431 U.S. 145 (1977)); *accord Rose v. Lundy*, 455 U.S. 509, 548 n.18 (1982) (Stevens, J., dissenting).

As this Court has repeatedly held, § 2255 "was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by *habeas corpus*." *Hill*, 368 U.S. at 427; *see also Davis*, 417 U.S. at 344 ("there can be no doubt that the grounds for relief under § 2255 are equivalent to those encompassed by

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[14] In the court of appeals, petitioner repeatedly argued that the grounds for relief under §§ 2254 and 2255 were equivalent, Brief of Appellant in Cause No. 90-3264 (7th Cir.) at 28 n.10, Reply Brief of Appellant at 8 n.2, and indeed appeared to concede the applicability of the "fundamental defect-complete miscarriage of justice" standard to nonconstitutional claims brought under § 2254. Brief of Appellant at 26; Reply Brief at 7.

§ 2254, the general federal habeas corpus statute"). Such a conclusion should hardly be controversial, since both statutes were passed in 1948 as part of the revision of the Judicial Code and Section 2254 was expressly intended to be "declaratory of existing law as affirmed by the Supreme Court." H.R. Rep. No. 308, 80th Cong., 1st Sess., A180 (1947). There is no sound basis for repudiating those repeated acknowledgments of the equivalence of § 2254 and § 2255 in this regard.[15]

If anything, as suggested by the First Circuit, concerns of federalism and comity not present when reviewing federal judgments may make § 2254 "more, rather than less, restrictive than § 2255." *Fasano v. Hall*, 615 F.2d 555, 557 (1st Cir.), *cert. denied*, 449 U.S. 867 (1980). In addition, § 2254 review is more attenuated from the judgment of conviction than § 2255 review in most cases. Because most States make available some form of collateral review following the direct appeal, § 2254 actually provides a third layer of review as opposed to the second layer provided to

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[15]Petitioner's only real argument seems to be that there is some sort of need to have the lower federal courts sit as courts of appeal over the state courts. Pet. Br. at 32 ("federal prisoners already have had federal review of their federal law and constitutional claims; the state prisoners have not."). The notion that *habeas corpus* should serve as some sort of proxy for a federal appeal is anaethema to this Court's jurisprudence. Indeed, as the very cases petitioner quotes hold, "the writ of *habeas corpus* will not be allowed to do service for an appeal." *E.g.*, *Sunal v. Large*, 332 U.S. 174, 178 (1947); *see* Pet. Br. at 33. Nor is it as crucial as petitioner seems to believe to have all issues of federal law reviewed by the federal district courts and courts of appeals. *Cf. Swain v. Pressley*, 430 U.S. 372, 382-83 & n.16 (1977) (noting adequacy of decision-making process that restricted both direct and collateral review of criminal convictions to the District of Columbia Court of Appeals, with review in this Court from those decisions). As noted *supra* at 21, the supposed "uniformity" concerns raised by petitioner, Pet. Br. at 28-31, would not necessarily be served by the rule he proposes, and might even be *disserved*.

federal prisoners by § 2255. In any event, as to nonconstitutional claims, at least, there is no reason for *more* stringent review.

As this Court's cases make plain, the "fundamental defect" standard applies to *any* claim that is "neither constitutional nor jurisdictional." *Timmreck*, 441 U.S. at 783-84; *Hill*, 368 U.S. at 428; *Stone*, 428 U.S. at 478 n.10. Petitioner's proposed distinction between laws that "protect" constitutional rights and those that do not is specious, for almost any law relating to criminal procedure can be characterized as "protecting" a constitutional right. For example, this Court has itself recognized that Fed. R. Crim. P. 11, the rule at issue in *Timmreck*, "is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary." *McCarthy v. United States*, 394 U.S. 459, 465 (1969). Similarly, the right to allocution at sentencing, at issue in *Hill*, has been described as "constitutionally based." *United States v. Jackson*, 923 F.2d 1494, 1496 (11th Cir. 1991), and some courts have held that denial of a defendant's request to speak violates due process. *Boardman v. Estelle*, 957 F.2d 1523, 1528-30 (9th Cir.), *cert. denied*, 113 S. Ct. 297 (1992); *Ashe v. North Carolina*, 586 F.2d 334, 336-37 (4th Cir. 1978), *cert. denied*, 441 U.S. 966 (1979).[16]

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[16]*Withrow*'s discussion of the "safeguard" function of the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), is inapposite. The purpose of that discussion was to analyze the applicability of *Stone*; the Court did not discuss the possibility that a *Miranda* violation is not a fundamental defect. Such a discussion would be largely academic, in any event, because the Court announced the same day as *Withrow* that a *Miranda* violation cannot be the basis for *habeas* relief unless it resulted in "actual prejudice" to the verdict — the functional equivalent of a fundamental defect. *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). *Withrow* thus cannot be relied on for the proposition that the violation of any law which safeguards a constitutional right is a fundamental defect giving rise to collateral relief.

Although the Court has left open whether a showing of prejudice will be *sufficient* to satisfy the *Hill* "fundamental defect" standard, *Hill*, 368 U.S. at 428; *Timmreck*, 441 U.S. at 784-85, it has left no doubt that such a showing is *necessary*. *See Hill*, 368 U.S at 429 (rejecting claim where "all that is shown" is violation of rule); *Timmreck*, 441 U.S. at 783 (noting absence of "any showing of prejudice"). Indeed, the "complete miscarriage of justice" component of the standard suggests by its very language that a particularly high standard of prejudice is required, for the Court has reserved the phrase "miscarriage of justice" to describe *habeas* cases in which the petitioner can make a showing of "factual innocence," *Sawyer v. Whitley*, 112 S.Ct. 2514, 2518-19 (1992), or at least an effect upon the reliability of the guilt determination, *McCleskey v. Zant*, 499 U.S. 467, 502 (1991).[17]

Once the fundamental defect standard has been properly defined, its application to this case is not hard. Reed has not argued that the trial date was a fundamental defect in the proceeding that resulted in any prejudice to him, much less a "complete miscarriage of justice." Indeed, he appears to concede that he cannot show actual prejudice, arguing instead that every violation of the IAD time limits is a *per se* miscarriage of justice. Pet. Br. 36-38. As demonstrated above, however, Reed must show more than a "failure to comply with the formal requirements" of the IAD to obtain the extraordinary relief afforded by the writ of *habeas corpus*. *Hill*, 368 U.S. at 429.

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[17]The requirement of actual prejudice arises from the fundamental defect standard, not the IAD. Thus it is irrelevant that the IAD does not expressly condition dismissal on a finding of prejudice or that this Court ordered dismissal in a direct appeal case, *United States v. Mauro*, 436 U.S. 340 (1978). *See* Pet. Br. 37 n.20.

Nothing in this record suggests the sort of specific prejudice that is the "more serious" harm prevented by a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

> If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past.

Id. Excessive delay may "presumptively compromise[] the reliability of a trial" in ways that cannot be proven or identified, *Doggett v. United States*, 112 S.Ct. 2686, 2693 (1992), but the nine-month delay between accusation and the first trial date in this case would not be enough to even trigger the four-factor *Barker* analysis. *See* authorities collected *supra* at 31.

Reed has never claimed that evidence or witnesses were lost as a result of the delay in this case. Neither has he alleged that the prosecution gained any advantage from the delay. This was noted by the court of appeals. 984 F.2d at 212 (J.A. 207-08). If anything, the delay worked to Reed's advantage. His federal custody ended on August 29, 1983 (J.A. 99), and he posted bond and was released from the Fulton County Jail on September 28, 1983 (J.A. 148). As he endlessly reminded the trial court, his ability to represent himself was hampered by his incarceration. For this reason he moved to continue the trial from September 19, 1983 (J.A. 128-30), and asked the court to delay the trial as long as possible when pretrial publicity required discharge of the jury venire (J.A. 141-42). Thus, Reed had been out of jail for three weeks when the trial began on October 18, 1983.

Because Reed has not even attempted to show that he was prejudiced by the delay in his trial from August 25 to September 19, 1983, he cannot as a matter of law receive

habeas corpus relief under the "fundamental defect" standard.[18]

IV. THIS COURT SHOULD NOT DECIDE THE MERITS OF PETITIONER'S IAD CLAIMS BECAUSE THE COURT OF APPEALS DID NOT PASS ON THOSE ISSUES AND THEY WERE NOT FAIRLY PRESENTED BY THE PETITION FOR WRIT OF CERTIORARI.

Even if this Court concludes that alleged violations of the IAD fall within the jurisdictional grant of the *habeas* statutes and that collateral review is appropriate notwithstanding the rule of *Stone v. Powell* and the fundamental defect-complete miscarriage of justice standard, this Court should decline petitioner's invitation to decide the merits of his IAD claim for at least two reasons: (1) such consideration would violate this Court's well-established practice of refusing to pass upon issues not decided by the court below, and (2) the question was not fairly presented in the Petition for Writ of Certiorari.

Because of its view that violations of the IAD could not be reviewed on federal *habeas corpus* where the petitioner had a full and fair opportunity to litigate those claims in the state courts, the Seventh Circuit did not determine whether petitioner's rights under the IAD had in fact been violated. Nonetheless, the petitioner asks this Court not only to hold

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[18]Reed has not argued in his brief, as he did below and in his Reply Brief in Support of Petition for Certiorari (at 5-6), that he was prejudiced because the detainer prevented his participation in a halfway house program while awaiting trial. In any event, while the effect on the availability of rehabilitative programs was a motivating factor for the IAD itself, *see* Article 1, such considerations are not relevant to a determination of whether the trial was unfair or unreliable. Nothing in this Court's precedents suggests that the scope of *habeas corpus* relief includes compensation for the inability to participate in rehabilitative programs.

that the Court of Appeals erred in refusing to consider the merits of his IAD claim, but further asks this Court to proceed to adjudication of that claim in the first instance and "enter a judgment granting him a writ of *habeas corpus*." Pet. Br. at 42.

However, this Court ordinarily will not consider questions that were not passed on by the court below. *E.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984). While this rule "is not inflexible," petitioner has provided no reason whatever for this Court to disregard its long-standing practice, and there are particularly strong reasons not to do so in this case.

None of the three courts that have considered the issue (the trial court, the Indiana Supreme Court on direct review, and the district court on *habeas*) have found that petitioner had a valid IAD claim. The district court held, for example, that when the time under the IAD was properly calculated by excluding delay attributable to defense motions, the petitioner was brought to trial well within the IAD's time limits. J.A. 196.[19] Despite petitioner's attempt to portray that conclusion as groundless, with only a single exception the courts of appeal have uniformly applied such an analysis. *See United States v. Cephas*, 937 F.2d 816, 819, 821 (2d Cir. 1991); *United States v. Walker*, 924 F.2d 1, 5 (1st Cir. 1991); *United States v. Dawn*, 900 F.2d 1132, 1136-37 (7th Cir. 1990); *United States v. Taylor*, 861 F.2d 316, 321-22 (1st Cir. 1988)[20]; *United States v. Nesbitt*, 852 F.2d 1502, 1515-

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[19]Respondent consistently argued this point in the lower courts. *See, e.g.*, Brief of Appellee at 13-15.

[20]Petitioner suggests that *Taylor* supports his position that such delay is not excludable. Pet. Br. at 41. This is simply inaccurate. Rather, the court in *Taylor* excluded time attributable to pretrial defense motions, leaving open the possibility that, under some circumstances, a motion properly invoking the IAD's time limits might require a different analysis. 861 F.2d at 322 & n.4; *accord Walker*, 924 F.2d at 5.

16 (7th Cir. 1988); *United States v. Roy*, 771 F.2d 54, 59 (2d Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986); *United States v. Scheer*, 729 F.2d 164, 168-69 (2d Cir. 1984); *United States v. Hines*, 717 F.2d 1481, 1486-87 (4th Cir. 1983); *United States v. Black*, 609 F.2d 1330, 1334-35 (9th Cir. 1979); *see also Foran v. Metz*, 463 F. Supp. 1088, 1097-98 (S.D.N.Y.), *aff'd mem.* 603 F.2d 212 (2d Cir.), *cert. denied*, 440 U.S. 830 (1979); *accord State v. Masselli*, 43 N.J. 1, 202 A.2d 415, 421 (1964) (expressly "reserv[ing] the question whether the pendency of defendant's motion to dismiss, which in fact prevented putting him on trial" operated to toll IAD time limits); *State v. George*, 271 N.C. 438, 156 S.E.2d 845, 848 (1979) ("the defendant cannot complain of delay in his trial when caused by his own motion."); *State v. Lippolis*, 107 N.J. Super. 137, 257 A.2d 705, 707 (App. Div. 1969) (defendant was "unable to stand trial" within the meaning of the IAD when in attendance at a hearing in another jurisdiction); *contra Birdwell v. Skeen*, 983 F.2d 1332 (5th Cir. 1993) (not citing any of the foregoing authorities). As two courts of appeal have noted, this approach has the added benefit of simplifying the courts' application of that statute in conjunction with other federal speedy trial provisions. *Cephas*, 937 F.2d at 819; *United States v. Odom*, 674 F.2d 228, 231 (4th Cir. 1982).

The trial court and the Indiana Supreme Court concluded that petitioner had waived the IAD time limits by failing to object when a trial date was set and by filing motions after that time indicating an apparent intent to proceed to trial. J.A. 113-14; 156-57. These rulings, too, are at least arguably in line with existing caselaw under the IAD. *E.g.*, *People v. White*, 33 App. Div. 2d 217, 305 N.Y.S.2d 875, 878 (1969) (motion to suppress filed after expiration of IAD time limits amounted to a waiver).

In sum, petitioner's IAD claim is not nearly so straightforward as his brief attempts to portray it. Even if the

claim is cognizable on *habeas*, the court of appeals should be given the opportunity to address the claim in the first instance.

Perhaps more importantly, this Court did not grant certiorari to consider the merits of petitioner's IAD claims. The petition for certiorari presented a single question:

> Did the court of appeals err by extending the reasoning of *Stone v. Powell* to bar federal *habeas* review of a state prisoner's claim that he was being held in custody in violation of the IAD. . . .

Petition for Writ of Certiorari at i.[21] Nowhere in the question presented, or in the entire petition, for that matter, does petitioner suggest that this Court should review the merits of the IAD issue. Indeed, even the question presented in petitioner's *brief* does not suggest such a thing. *See* Pet. Br. at i (stating the question presented as whether the court of appeals erred by applying *Stone v. Powell* and "by refusing to provide this claim with collateral review based upon the same standards that it would use in collateral review of a constitutional claim.").[22]

Just as this Court ordinarily will ordinarily decline to pass upon an issue not decided by the court of appeals, it similarly will normally decline to decide questions not presented in the petition. *See* Sup. Ct. R. 14.1(a); *Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992); *Irvine v. California*, 347 U.S. 128, 129 (1954) (plurality opinion).

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[21]The remainder of the question presented consisted of a gratuitous characterization of the IAD as "a 'law[] . . . of the United States,'" and an argumentative recitation of circumstances that supposedly made it "particularly" appropriate for this Court to review the question quoted in the text, but did not suggest the other issues petitioner now raises.

[22]Respondents do not dispute that, should the Court find *habeas* jurisdiction and reject application of *Stone*, a determination of the correct standard of review *is* fairly included.

Again, petitioner provides no reason this Court should disregard that rule, and the reasons set forth above counsel against the Court's doing so in this case.

CONCLUSION

The Great Writ of *habeas corpus* is not a remedy for breach of contract, even where the contract is an agreement among the States. Rather, the writ lies to assure that the fundamental federal constitutional rights of criminal defendants are observed. Because granting the writ would not serve that purpose here, the judgment of the court of appeals affirming the denial of the writ of *habeas corpus* should be affirmed.

Respectfully submitted,

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Appendix A

Ind. Code § 35-33-10-4. Agreement on detainers; defendants confined in other jurisdiction of United States

Sec. 4. Securing attendance of defendants confined as prisoners in institutions of other jurisdictions of the United States — Agreement on detainers.

Text of the Agreement of Detainers

The contracting states solemnly agree that:

Article I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article 2

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time he initiates a request for final disposition pursuant to Article 3 of this section or at the time that a request for custody or availability is initiated pursuant to Article 4 hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article 3 or Article 4 hereof.

Article 3

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of correction or other official having custody of him, who shall promptly

forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of correction or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, information or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition specifically directed. The warden, commissioner of correction or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge of proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon

him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

Article 4

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article 5(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated; provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request; and provided further that there shall be a period of thirty (30) days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody of availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time

remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided by paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article 5 (e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Article 5

(a) In response to a request made under Article 3 or Article 4 hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice

provided for in Article 3 of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment,information of complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article 3 or Article 4 hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations [or] complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which is presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivision, as to the payment of costs, or responsibilities therefor.

Article 6

(a) In determining the duration and expiration dates of the time periods provided in Articles 3 and 4 of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

Article 7

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

Article 8

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

Article 9

1. This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is

held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

2. The phrase "appropriate court" as used in the agreement on detainers shall, with reference to the courts of this state, mean any court with criminal jurisdiction.

3. All courts, department, agencies, officers and employees of this state and its political subdivision are hereby directed to enforce the agreement on detainers and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purpose.

4. Escape from custody while in another state pursuant to the agreement on detainers shall constitute an offense against the laws of this state to the same extent and degree as an escape from the institution in which the prisoner was confined immediately prior to having been sent to another state pursuant to the provisions of the agreement on detainers and shall be punishable in the same manner as an escape from said institution.

5. It shall be lawful and mandatory upon the warden or other official in charge of a penal or correctional institution in this state to give over the person of any inmate hereof whenever so required by the operation of the agreement on detainers.

6. The governor is hereby authorized and empowered to designate an administrator who shall perform the duties and functions and exercise the powers conferred upon such person by Article 7 of the agreement on detainers.

7. In order to implement Article 4(a) of the agreement on detainers, and in furtherance of its purposes, the

appropriate authorities having custody of the prisoner shall, promptly upon receipt of the officer's written request notify the prisoner and the governor in writing that a request for temporary custody has been made and such notification shall describe the source and contents of said request. The authorities having custody of the prisoner shall also advise him in writing of his rights to counsel, to make representations to the governor within thirty (30) days, and to contest the legality of his delivery.

APPENDIX B: TABLE OF STATES ADOPTING THE IAD BY YEAR OF ADOPTION

Year	State	Statutory Citation
1957	Connecticut	(C.G.S.A. §§ 54-186 to 54-192)
1958	New Jersey	(N.J.S.A. 2A:159A-1 to 2A:159A-15)
1959	New Hampshire	(R.S.A. 606-A:1 to 606-A:6)
	Pennsylvania	(42 Pa.C.S.A. §S 9101 to 9108)
1961	Michigan	(M.C.L.A. §§ 780.601 to 780.608)
1963	Montana	(M.C.A. 46-31-101 to 46-31-204)
	California	(West's Ann. Cal. Penal Code §S 1389 to 1389.8)
	Nebraska	(R.R.S. 1943, §§ 29-759 to 29-765)
1965	North Carolina	(G.S. §§ 15A-761 to 15A-767)
	Iowa	I.C.A. §§ 821.1 to 821.8)
	South Carolina	(Code 1976, §§ 17-11-10 to 17-11-80)

1965 (Cont'd)

	Maryland	(Code 1957, art. 27, §§ 616A to 6168)
	Hawaii	(HRS §§ 834-1 to 835-6)
1966	Massachusetts	M.G.L.A. c. 276 App. §§ 1-1 to 1-8)
1967	Washington	(West's RCWA 9.100.010 to 9.100.080)
	Vermont	(28 V.S.A. §§ 1501 to 1509, 1531 to 1537)
	Minnesota	(M.S.A. § 629.294)
1969	Oregon	(ORS 135.775 to 135.793)
	Ohio	(R.C. §§ 2963.30 to 2963.35)
	Delaware	(11 Del.C. §§ 2540 to 2550)
	Colorado	(C.R.S. 24-60-501 to 24-60-507)
1970	Arizona	(A.R.S. §§ 31-481, 31-482)
	District of Columbia	(D.C.Code 1981, §§ 224-701 to 24-705)
	Kansas	(K.S.A. 22-4401 to 22-4408)
	Tennessee	(T.C.A. §§ 40-31-101 to 40-31-108)
	Virginia	(Code 1950, §§ 53.1-210 to 53.1-215)
	Wisconsin	(W.S.A. 976.05, 976.06)

1970 (Cont'd)

	United States	(18 U.S.C. app.)
	New York	(McKinney's CPL § 580.20)
1971	Wyoming	(W.S.1977, §§ 7-15-101 to 7-15-107)
	West Virginia	(W. Va. Code 62-14-1 to 62-14-7)
	Arkansas	(A.C.A. §§ 16-95-101 to 16-95-107)
	Idaho	(I.C. §§ 19-5001 to 19-5008)
	Maine	(34-A M.R.S.A. §§ 9601 to 9609)
	Missouri	(V.A.M.S. §§ 217.490 to 217.520)
	Nevada	(N.R.S 178.620 to 178.640)
	New Mexico	(NMSA 1978, § 31-5-12)
	North Dakota	(NDCC 29-34-01 to 29-34-08)
1972	Georgia	(O.C.G.A §§ 42-6-20 to 42-6-25)
1973	Florida	(West's F.S.A. §§ 941.45 to 941.50)
	Illinois	(S.H.A. ch. 38 1003-8-9)
	Indiana	(Ind. Code 35-33-10-4)

1974	Rhode Island	(Gen.Laws 1956, §§ 13-13-1 13-13-8)
	Kentucky	(K.R.S. 440.450 to 440.510)
1975	Texas	(Vernon's Ann.Texas Code Cr. Pr. Art. 51.14)
	Utah	(U.C.A.1953, 77-29-5 to 77-29-11)
1977	Oklahoma	(22 Okl.St.Ann §§ 1345 to 1349)
1978	Alabama	(Code 1975, § 15-9-81)
1981	Alaska	(AS 33.35.010 to 33.35.040)

No. 93-5418

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ORRIN SCOTT REED,

Petitioner,

v.

ROBERT FARLEY, Superintendent, Indiana State Prison, and PAMELA CARTER, Attorney General Of Indiana,

Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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I. THE IAD IS A "LAW [ ] . . . OF THE UNITED STATES" WITHIN THE MEANING OF THE HABEAS CORPUS STATUTE.

Respondents' new jurisdictional argument lacks merit. (R. Br. 13-21.) In *Carchman v. Nash*, 473 U.S. 716, 719 (1985), alerted to the jurisdictional issue by an amicus brief in which Indiana participated,[1/] this Court held that habeas corpus jurisdiction extended to the IAD: "The [IAD] is a congressionally sanctioned interstate compact within the Commerce Clause, U.S. Const., Art. I, § 10, cl. 3, and thus is a federal law subject to federal construction." Based on *Carchman*, the United States concludes that jurisdiction exists. (Amicus Br. 11 n.5.) Indeed, in their opposition to certiorari, Respondents themselves relied on *Carchman* for the strong (and accurate) statement that "[t]here is no question that the IAD is a federal law which can be the basis for federal *jurisdiction* . . . ." Opp. at 10 (emphasis in original).[2/] *See also Fex v. Michigan*, 113 S. Ct. 1085 (1993) (certiorari granted under 28 U.S.C. § 1257 to review the Michigan Supreme Court's interpretation of the IAD).

II. *STONE v. POWELL* DOES NOT APPLY TO BAR CATEGORICALLY FEDERAL COLLATERAL REVIEW OF IAD SPEEDY TRIAL CLAIMS.

Citing *Stone v. Powell*, 428 U.S. 465 (1976), Respondents would have this Court bar, categorically, all IAD claims from federal habeas corpus review. (R. Br. 21-34.) In making this

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1/ See Brief of the Amici Curiae States at ii n.3, filed in *Carchman*.

2/ Respondents also relied on *Carchman* in the court of appeals, where they conceded: "There is no question that a federal court has jurisdiction under 28 U.S.C. § 2254 to entertain a claim that the [IAD] has been violated . . . ." (Appellees' Br. at 6.) The cases they cite on territorial legislation and on unrelated compacts, all substantially predate *Carchman*; not one addresses the IAD. Those cases do not provide even a colorable basis for questioning this Court's jurisdictional holding in *Carchman*.

argument, Respondents overlook the actions of Indiana in this matter, which amply demonstrate the need for collateral review. Here, the local officers of Indiana's executive and judicial branches signed a Request for Temporary Custody stating that they "propose[d] to bring [Petitioner] to trial on this information within the time specified in Article IV(c) of the Agreement." (J.A. 4-6.) Both the judge and the prosecutor then completely ignored the 120-day time limit of Article IV(c), even though Petitioner, effectively without counsel or access to a law library while in jail, made several requests for a timely trial. On appeal, the Indiana Supreme Court refused to enforce the IAD; despite the fact that Congress made the Article IV(c) 120-day trial deadline automatic ("trial shall be commenced within 120 days of the arrival of the prisoner in the receiving State"), and despite Petitioner's three written requests for a timely trial during the 120-day period (J.A. 56, 88, 91), the Indiana Supreme Court concluded that Petitioner had waived that deadline. (J.A. 157.) By thus holding a *pro se* defendant to a much higher standard of compliance with the IAD than either the prosecutor or the trial judge, Indiana has evidenced hostility to Petitioner's federal rights and has demonstrated why collateral review must remain available.

A. Respondents Provide No Rational Justification For Creating A Categorical Bar To Federal Review.

Because the IAD is a "law[ ] . . . of the United States," review of state compliance with the IAD falls within the scope of federal habeas corpus jurisdiction created by Congress. 28 U.S.C. § 2254. Congress reemphasized the federal courts' enforcement role in the IAD itself, specifically providing that "[a]ll courts . . . of the United States . . . are hereby directed to enforce the agreement . . . ." 18 U.S.C. app. § 5. This stands in stark contrast to *Stone*, where this Court was free to shape or limit the contours of the exclusionary rule because this Court created that rule in the first place. *See Stone*, 428 U.S. at 482-83 (detailing judicial creation of the exclusionary rule); *see also id.* at 500 (Burger, C.J., concurring) ("the same authority that empowered the Court to supplement the [fourth] amendment by the exclusionary rule a hundred and twenty-five years after its adoption, likewise allows it to modify that rule as the 'lessons of experience' may teach" (internal quotations omitted)). Where, as here, Congress enacted the rule, however, this Court is more constrained. *See Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1727 (1992) (O'Connor, J., dissenting) ("While we may deprive portions of our own prior decisions of any effect, we generally may not, of course, do the same with portions of statutes.").

Respondents attempt to avoid this constraint by emphasizing the equitable nature of habeas corpus, but they ignore the fact that the categorical bar they seek is antithetical to the exercise of equitable discretion. The categorical bar of *Stone* is justified because the exclusionary rule is "necessarily divorced from the correct ascertainment of guilt," *see Withrow v. Williams*, 113 S. Ct. 1745, 1753 (1993): each time the exclusionary rule is applied, it keeps relevant evidence (illegitimately obtained) from the finder of fact. The same is not true of the IAD's 120-day limit for trial. Delay leads to reduced accuracy in ascertaining guilt. *See, e.g., Doggett v. United States*, 112 S. Ct. 2686, 2692 (1992); *Barker v. Wingo*, 407 U.S. 514, 532 (1972); *see also Smith v. Hooey*, 393 U.S. 374, 379-80 & n.11 (1969).

When Respondents ask whether a trial held 121 days after transfer is any less sound than one held 120 days after transfer (R. Br. 30), they ask the wrong question. The relevant question is whether in the long run a system that permits late trials will be less reliable than a system that mandates speedy trials. *See Withrow*, 113 S. Ct. at 1753. The answer this Court has given in *Doggett*, *Barker*, and *Smith* is "yes." More important, *Congress* has decided that 120 days is the maximum time a state can make an IAD transferee wait for trial (absent a showing, in open court with the detainee or his counsel present, of good cause for delay, which was not made here).

Respondents' argument that Indiana's voluntary participation in the IAD insulates it from review (R. Br. 25) does not withstand analysis. Indiana has decided to participate in an interstate compact, from which it obtains benefits and in which it undertakes obligations. While it is true that Indiana could withdraw from the IAD and thereby free itself of Articles IV(c) and V(c), at least prospectively,[3] it would no longer be able to obtain custody of prisoners through the IAD. There is nothing "peculiar" about requiring a state to obey Congress's mandate when that state takes advantage of a benefit conferred by federal law. *See, e.g.*, *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990) (although participation in the federal Medicaid program is voluntary, participating states must comply with the federal Medicaid Act's requirements); *King v. Smith*, 392 U.S. 309, 316 (1968) (although participation in the federal program for Aid to Families with Dependent Children is voluntary, participating states must administer program in accordance with federally-approved plan).

Congress enacted the IAD in part to protect the rights of prisoners transferred under detainers. Respondents' argument to the contrary (R. Br. 27-29) overlooks *Carchman* ("Congress . . . enacted the Agreement in part to vindicate a prisoner's constitutional right to a speedy trial," 473 U.S. at 731 n.10); *Cuyler v. Adams* (the IAD established "procedures that ensure protection of the prisoner's speedy trial rights," 449 U.S. 433, 435 n.1 (1981)); the Senate Report on the IAD ("the enactment of this legislation would afford defendants in criminal cases the right to a speedy trial," S. Rep. No. 1356, 91st Cong., 2d Sess. at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4864); and the IAD itself (the IAD is intended to address "difficulties in securing speedy trial of persons already incarcerated in other jurisdictions," Art. I,

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[3] The IAD states: "the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof." Art. VIII, 18 U.S.C. app. § 2.

18 U.S.C. app. § 2; and *see generally*, Art. VIII, *id.*, discussing the "rights" of "inmates" under the IAD). Indiana cannot use the IAD to obtain prisoners without treating them in accordance with the dictates of Congress.[4]

Respondents' argument that the 120-day period was intended solely to benefit sending states does not withstand scrutiny. Respondents do not explain what interest of the sending state would justify requiring that the receiving state dismiss its charges with prejudice if the transferee is not tried within 120 days. If it were the sending state's interest alone that Congress is vindicating in Articles IV(c) and V(c), surely the IAD would provide a mechanism whereby the sending state could waive that interest in deference to its sister state's interest in pursuing prosecution. Moreover, the Indiana Supreme Court takes the view that the IAD protects transferee prisoners' speedy trial rights; it has held "that Ind. R. Cr. P. 4 [Indiana's speedy trial rule] does not apply when the IAD statute is applicable." *Williams v. State*, 533 N.E.2d 1193, 1195 (Ind. 1989). Plainly, the dismissal with prejudice is directed to protect the speedy trial rights of prisoners who have been transferred pursuant to the IAD; dismissal is the only appropriate remedy for speedy trial violations. *See Strunk v. United States*, 412 U.S. 434, 439-40 (1973); *Barker*, 407 U.S. at 522.

Respondents' argument that the IAD does not protect a fundamental right because it has a good cause exception and harsh

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[4] Respondents' fallback argument, that the IAD's "mechanism of transfer" solves any potential speedy trial problem, also fails. (R. Br. 29.) A system that provides for the transfer of inmates without directing that such inmates be brought to trial within a certain period would still permit the violation of speedy trial rights. The drafters of the IAD and Congress recognized this fact and therefore adopted the 120-day time limit in conjunction with the remedy for violation of dismissal with prejudice. Arts. IV(c), V(c), 18 U.S.C. app. § 2.

remedy (R. Br. 26-27) is incorrect.[5] To the contrary, these features define the very profile of statutes enacted to protect fundamental speedy trial rights. Indiana's own speedy trial rules fit the same profile as the IAD and, according to the Indiana Supreme Court, thereby vindicate the Sixth Amendment right to a speedy trial -- "one of the most basic rights preserved by the Constitution." *See Fossey v. State*, 258 N.E.2d 616, 618 (Ind. 1970). Under Indiana's Criminal Rule 4(B), a defendant in jail pending trial has a right to request an early trial; once a defendant makes such a motion,

> he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar.

Ind. R. Cr. P. 4(B)(1) (West 1994). As the Indiana courts have recognized in discharging defendants under Rule 4(B), the "right to a speedy trial is an amorphous concept, the violation of which is not susceptible to precise determination," which is precisely why it is necessary "to provide clarity by specifying in more definitive terms the point at which a defendant's . . . right to a speedy trial

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[5] The fact that the United States amended the IAD to permit dismissal without prejudice under certain circumstances does not reflect the unimportance of the right. (R. Br. 26 n.11.) Indeed, this amendment was made with the anti-shuttling provisions of the IAD in mind, and had nothing to do with the speedy trial right. Congress amended section 9 of the IAD because the policy behind the anti-shuttling provision is not necessarily implicated when inmates are transferred between federal and state custody, as "the transfer may only involve the defendant being taken across the street from the state court to the federal court." 134 Cong. Rec. S17,371 (Nov. 10, 1988 (bill analysis); *see also* 134 Cong. Rec. H11,254 (Oct. 21, 1988) (same); 134 Cong. Rec. S7451 (June 8, 1988) (same). Had Congress actually concluded that the speedy trial right is not important, as Respondents suggest, it would have abolished the 120-day trial limit, substantially increased that limit, or provided only for dismissal without prejudice.

can be said to have been abridged and discharge is required." *Crosby v. State*, 597 N.E.2d 984, 988 (Ct. App. Ind. 1992). This is exactly what the IAD accomplishes, when it is enforced.[6]

B. The Institutional Costs Of Federal Collateral Review Are Neither Unexpected Nor Substantial.

The "cost" of federal collateral review was known to Indiana in 1973 when it signed the IAD, both from section 5 of the IAD (which specifies federal court enforcement) and from existing habeas corpus case law.[7] As it has participated in the IAD now for twenty years, during which time habeas review of IAD claims has been a given, Indiana's argument that such review may create an "incentive for States to opt out of participation in the IAD" (R. Br. 33) is a bluff -- especially since the *Stone* categorical bar analysis originated with the court of appeals *sua sponte*, and not with Respondents.[8] Furthermore, in enforcing the IAD, this Court need not concern itself with whether Indiana would rather withdraw from the IAD than apply its provisions faithfully; that decision rests with the Indiana legislature.

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[6] In fact, Indiana has addressed the problem by interpreting its own constitutional speedy trial right to require a specified time limit, so that a violation of Criminal Rule 4 "is considered a *per se* denial of the [state constitutional] speedy trial right." *Fossey*, 258 N.E.2d at 619. If no demand is made under Rule 4(B), Indiana must try a defendant within one year of filing charges or discharge him. Ind. R. Cr. P. 4(C); *see also Huffman v. State*, 502 N.E.2d 906, 908-09 (Ind. 1987) (discharging felony charges against convicted defendant because state did not try him within one year).

[7] By 1973, there were published decisions involving habeas corpus challenges brought under the IAD. *See, e.g., United States v. Pennsylvania*, 429 F.2d 522, 523-24 (3d Cir. 1970); *Kane v. State of Virginia*, 419 F.2d 1369, 1373-74 (4th Cir. 1970).

[8] No other state has sought leave to file an amicus curiae brief in support of Indiana in this case.

In assessing the "costs" of habeas review, Respondents include the dismissal of charges against persons whose IAD speedy trial rights were violated. (R. Br. 32.) This assessment is erroneous; because successful petitions establish that the state has violated federal rights, successful petitions are "costs" of the state's unlawful conduct rather than "costs" of federal collateral review.

Experience teaches that the actual "costs" of collateral review in IAD cases are small. Congress adopted a "bright-line" test in the IAD specifically to reduce states' "costs" by "diminish[ing] the possibility of convictions being vacated or reversed because of a denial of [the speedy trial] right." S. Rep. No. 1356, at 1. Forty-eight states have signed the IAD; not one has withdrawn because of the costs of federal collateral review.

This Court should refuse to extend *Stone* to bar categorically federal collateral review of IAD claims.

III. THERE IS NO JUSTIFICATION FOR REQUIRING A "COMPLETE MISCARRIAGE OF JUSTICE" BEFORE GRANTING RELIEF UNDER 28 U.S.C. § 2254 ON A PROPERLY PRESERVED CLAIM THAT THE IAD HAS BEEN VIOLATED.

This Court has never applied a "miscarriage of justice" standard in evaluating a properly preserved and presented petition for relief under section 2254. That standard is reserved for section 2254 petitioners who either have abused the writ or have not only procedurally defaulted their claims, but have also failed to excuse their default under the cause and prejudice test. Respondents' argument that the "miscarriage of justice" standard should apply to section 2254 petitions because it applies to section 2255 motions (R. Br. 34-40) is without merit: as is true in every one of Respondents' key section 2255 cases, issues presented in section 2255 motions almost always were or could have been presented to the same courts at trial and on direct review; section 2254, in contrast, exists to provide plenary federal review to state prisoners where federal rights are at stake.

A. State Prisoners With IAD Speedy Trial Claims Should Not Be Required To Show A Miscarriage Of Justice To Obtain Relief.

The importance Congress placed on the 120-day time limit for trials under the IAD cannot be denied. Respondents concede that the IAD requires automatic dismissal of the charges against a prisoner not timely tried, without a showing of prejudice. (R. Br. 38 n.17.) And though Respondents ignore it, Congress has directed, in section 5 of the IAD, that all federal courts enforce the provisions of the IAD. 18 U.S.C. app. § 5. Yet, despite the importance Congress has placed on this federal right, Respondents argue for a standard that will all but neutralize efforts to enforce that right on habeas review.

Specifically, Respondents argue that properly preserved and presented section 2254 claims alleging a violation of federal "laws" should be subject to a "miscarriage of justice" standard, which is far more stringent than the standard applied to properly preserved and presented section 2254 claims alleging constitutional violations. There is, of course, no basis for this argument in section 2254 itself; Congress does not distinguish between "the Constitution or laws . . . of the United States." 28 U.S.C. §§ 2241, 2254. *See generally National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 805 (1994) (refusing to impose "a requirement of economic motive neither expressed nor . . . fairly implied in the operative sections of the [RICO] Act"); *cf. Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979) (statutory language "business or property" must be construed to give full meaning to both terms). The Supremacy Clause dispels the notion that rights established by federal laws are entitled to less protection from state violation than constitutional rights: "This Constitution, and the Laws of the United States . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." U.S. Const. art. VI, § 2. Furthermore, in *Davis v. United States*, 417 U.S. 333, 346 (1974), this Court squarely rejected this very distinction

for section 2255, denying that "any line could be drawn on the basis of whether the claim had its source in the Constitution or in the 'laws of the United States.'"

Respondents contend that the miscarriage of justice standard is appropriate for properly preserved and presented section 2254 claims based on violations of federal "laws" because that standard is used to evaluate section 2255 challenges to federal convictions for violations of federal "laws." (R. Br. 34-37.) But Respondents fail to note that this standard also applies to section 2255 claims based on alleged constitutional violations[9] -- yet it does not apply to section 2254 constitutional claims that have been properly preserved and presented. Respondents' arguments are flawed because they fail to acknowledge the very fundamental differences between section 2255 motions and section 2254 petitions, which make the standard appropriate for section 2255 motions inappropriate for any properly preserved and presented section 2254 claims.

Collateral challenges to federal convictions implicate different interests than collateral challenges to state convictions; consequently, different standards apply for issuing relief. While it is true, as *Davis* states, that "*the grounds for relief* under § 2255 are equivalent to those encompassed by § 2254," 417 U.S. at 344 (emphasis added) -- which is to say that both section 2254 and section 2255 authorize collateral relief for "violations of the Constitution or laws . . . of the United States" -- that does *not* mean that the standards for establishing a right to relief under these two statutes are or should be the same.[10]

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[9] *See* cases cited, *infra*, n.11.

[10] Respondents quote too small a snippet from *Davis* when they assert that "collateral review does not reach 'every asserted error of law.'" (R. Br. 34.) The *Davis* Court actually said that "[not] every asserted error of law can be raised on a § 2255 motion." 417 U.S. at 346. The full quotation from *Davis* supports Petitioner's interpretation of that case -- that *Davis* concerned a procedural (continued...)

Congress established section 2254 habeas corpus relief for state prisoners to stand as a safeguard to ensure vindication of substantial federal rights for persons convicted in state courts that are potentially hostile to, or neglectful of, those federal rights -- as the Indiana courts were here. *Reed v. Ross*, 468 U.S. 1, 10 (1984) (Congress enacted section 2254 to make federal courts serve as "guardians of the people's federal rights" (citation omitted)). In contrast, section 2255, which addresses federal convictions, does not exist to protect criminal defendants from a forum potentially hostile to the petitioner's federal rights. To the contrary, Congress requires that section 2255 motions be brought before "the court which imposed the sentence," 28 U.S.C. § 2255, as "a further step in the movant's criminal case and not a separate civil action." Advisory Comm. Note, Rule 1 Governing Section 2255 Proceedings.

As a section 2255 motion is presented to the original trial court, its primary function is to permit that court to address matters that were not, and could not have been, addressed at trial or on direct appeal. *See* Larry W. Yackle, *Postconviction Remedies* § 108, at 422-23 & nn.81-84 (1981 & Supp. 1993) (noting "general rule" that "section 2255 motions will be dismissed summarily if they raise claims that were or might have been asserted on direct review," with an exception where a miscarriage of justice would result); 2 James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 36.7, at 569 & nn.38, 39 (1988) ("by contrast to habeas corpus actions, in which federal review of federal *legal* questions is plenary and *de novo*, the general -- albeit judge-made -- rule in section 2255 actions is that postconviction review of any sort is not needed or available as to claims previously rejected on their merits on direct appeal"); *id.* § 36.4, at 554 & n.5 (noting that

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[10] (...continued)
requirement applicable to section 2255 motions, and did not address section 2254 habeas petitions based on a violation of one of the "laws . . . of the United States."

claims "that the [section 2255] movant could have but did not raise on appeal" also generally are barred). Significantly, courts apply this "general rule" regardless of whether the section 2255 motion presents violations of federal law or of the federal constitution.[11/]

In each of Respondents' key cases, the issues raised by section 2255 motion "were or might have been asserted on direct review." Consequently, the movants in each were forced to address the "miscarriage of justice" standard. *See United States v. Timmreck*, 441 U.S. 780 (1979) (movant who pleaded guilty and failed to challenge on direct appeal the sentencing judge's failure to inform him of mandatory special parole term in violation of Fed. R. Crim. P. 11); *Davis v. United States*, 417 U.S. 333 (1974) (movant allowed to assert on collateral review a claim that had been raised and decided against him on direct review where intervening change in substantive criminal law otherwise would have caused a miscarriage of justice); *Hill v. United States*, 368 U.S. 424 (1962) (movant had not requested his Fed. R. Crim. P. 32(a) right to allocution at sentencing and then failed again to raise the issue on direct appeal); *Sunal v. Large*, 332 U.S. 174 (1947) (defendant failed to appeal district court's refusal to admit evidence of a tendered defense).

A section 2254 proceeding serves a fundamentally different function: to provide a federal forum to review the merits of federal claims that *were* addressed to the state trial and appellate courts. See *United States v. Frady*, 456 U.S. 152, 164-66 (1982), which

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[11/] *See, e.g., United States v. Orejuela*, 639 F.2d 1055, 1057 (3d Cir. 1981); *accord United States v. Jones*, 918 F.2d 9, 10-11 (2d Cir. 1990); *United States v. Redd*, 759 F.2d 699, 701 (9th Cir. 1985); *Tracey v. United States*, 739 F.2d 679, 682 (1st Cir. 1984); *United States v. Holtzen*, 718 F.2d 876, 878 (8th Cir. 1983); *United States v. Rowan*, 663 F.2d 1034, 1035 (11th Cir. 1981).

Respondents have simply ignored.[12/] Because virtually every ruling in a *federal* prosecution involves "the Constitution or laws . . . of the United States," 28 U.S.C. § 2255, the "miscarriage of justice" or "exceptional circumstances" rule is essential to prevent section 2255 motions from becoming a wasteful second round of appeals before the very same courts. But a standard designed to relieve federal courts of the burden of re-reviewing issues they already have or could have addressed, *i.e.*, the section 2255 miscarriage of justice standard, is singularly ill-suited to the task Congress has imposed through section 2254 upon the habeas courts of protecting the properly preserved and presented federal rights (be they constitutional or legal rights) of persons in state custody.

This essential distinction has long been recognized in this Court's opinions, and indeed undergirds the very decisions on which Respondents rely. In *Sunal*, from which *Hill*, *Timmreck*, and *Davis* derive, this Court took pains to note that its discussion focused on habeas challenges to federal rather than state convictions: "So far as convictions obtained in the federal courts are concerned, the general rule is that the writ of habeas corpus will not be allowed to do service for an appeal." 332 U.S. at 178. Although the *Sunal* Court expressly "put to one side comparable problems respecting the use of habeas corpus in the federal courts to challenge convictions obtained in the state courts," *id.*, it cited a series of cases addressing those problems in the state conviction

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[12/] In fact, Congress and this Court have required that state prisoners properly have presented and preserved their federal claims in the state courts before they can present them in federal court. *E.g.*, 28 U.S.C. § 2254(b), (c); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

context, which culminated in *Ex parte Hawk*, 321 U.S. 114 (1944).[13/]

In *Ex parte Hawk*, this Court plainly stated that the exceptional circumstances limitation does *not* apply to habeas review of state convictions where the state prisoner has properly presented and preserved his federal claims in the state courts:

> The statement that the writ is available in the federal courts only "in rare cases" presenting "exceptional circumstances of peculiar urgency," often quoted from the opinion of this Court in *United States ex rel. Kennedy v. Tyler* [269 U.S. 13], 17 [(1925)], was made in a case in which the petitioner had not exhausted his state remedies and is inapplicable to one in which the petitioner has exhausted his state remedies, and in which he makes a substantial showing of a denial of federal right.

321 U.S. at 117-18.[14/]

[13/] *Sunal* and *Hawk* thus establish that, contrary to Respondents' assertion (R. Br. 35), this Court's pre-section 2255 habeas decisions did recognize the distinction between challenges to federal convictions and to state convictions, and treated each kind of challenge accordingly.

[14/] This Court's *dictum* in footnote 10 of *Stone v. Powell*, 428 U.S. at 477 n.10, has generated some confusion concerning collateral review of claimed violations of the "laws . . . of the United States." A careful review of this footnote reveals that it never addresses the situation in this case, *i.e.*, where a state prisoner has properly presented and preserved his federal law claim in the state courts and now presents it in his first section 2254 petition. Because this situation is not addressed, this footnote is irrelevant to the issue *sub judice* in this case.

Moreover, though *Stone* footnote 10 mentions "habeas corpus" as well as section 2255, its discussion reflects a focus on section 2255, which is the context in which most non-constitutional issues arise, to the exclusion of section 2254. The footnote cites only section 2255 cases, starting with *Sunal*, but overlooks the state-federal distinction highlighted by the *Sunal* Court. *See* pp. 13-14, *supra*. Without further analyses, the *dictum* in the *Stone* footnote was placed into the background legal discussion in *United States v. Addonizio*, 442 U.S. 178, 185 (1979), a section 2255 case. *Addonizio*, like *Stone* footnote 10, does not discuss (continued...)

The "miscarriage of justice" standard is applied in section 2254 proceedings only to petitioners who have abused the writ in federal court, or who have procedurally defaulted their federal claims in state court and further have failed to excuse their default or abuse by satisfying the cause and prejudice standard. *See, e.g., Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1721 (1992) (adopting "the narrow exception to the cause-and-prejudice requirement: A habeas petitioner's failure to develop a claim in state-court proceedings will be excused . . . if he can show that a fundamental miscarriage of justice would result"); *Sawyer v. Whitley*, 112 S. Ct. 2514, 2518 (1992) ("even if a state prisoner cannot meet the cause and prejudice standard a federal court may hear the merits of the successive claims if the failure to hear the claims would constitute a 'miscarriage of justice'"); *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991) (abuse of the writ); *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986) (procedural default).

Petitioner has properly preserved and presented his IAD claim: he has exhausted his state remedies, avoided procedural default, and raised the claims in his first and only habeas petition under section 2254. This Court has never applied the "miscarriage of justice" standard to a properly preserved and presented claim under section 2254. Nor should it do so here. With respect to "a claim that is already properly before a federal court, the federalism concerns underlying our procedural default cases are diminished somewhat. By this point, our concern is less with encroaching on the territory of the state courts than it is with managing the territory of the federal courts in a manner that will best implement their responsibil-

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[14/] (...continued)
the section 2254 issue presented here.

Certainly this general background discussion in these two cases, which does not even address, much less critically analyze, the section 2254 issue now before this Court, neither compels nor recommends the adoption of a "miscarriage of justice" standard for evaluating the properly preserved and presented issue in Petitioner's section 2254 petition.

ity to consider habeas petitions." *Keeney*, 112 S. Ct. at 1725 (O'Connor, J., dissenting).

Nothing suggests that Congress intended to make section 2254 petitioners alleging violations of the IAD into third class citizens in the federal habeas courts, relegated to the low level of review given those who default (without cause and prejudice) their constitutional claims. To the contrary, Congress required that tardy trials under the IAD be remedied through dismissal of the criminal charges with prejudice, and then expressly directed all federal courts to enforce the IAD. Adopting the "miscarriage of justice" standard will eviscerate federal enforcement of this federal right and permit -- even encourage -- lax state court enforcement of the timely trial requirements of the IAD.

B. Violations Of The IAD's Speedy Trial Right Are Inherently Prejudicial.

Just last term, this Court held that only those habeas petitioners who assert a "trial error" on collateral review -- that is, an error that "occurs during the presentation of the case to the jury" -- are required to show that the error "had substantial and injurious effect or influence" on the verdict, *i.e.*, that they were actually prejudiced by the error. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1717, 1721-22 (1993) (internal quotations omitted). In contrast, this Court explained that habeas petitioners who allege and establish an error relating to a "structural defect in the constitution of the trial mechanism" -- that is, an error that by its very nature "infect[s] the entire trial process" -- are entitled to "automatic reversal of the conviction" on collateral review. *Id.* at 1717.

Indiana's violation of the IAD's provisions requiring trial within 120 days or dismissal with prejudice was not a mere "trial error"; rather it was a "structural defect" in the trial mechanism "which infect[ed] the entire trial process." *Id.* But for Indiana's refusal to comply with the IAD's mandatory dismissal requirement, the trial never would have occurred and Petitioner never would have been convicted. Stated differently, by imposing a dismissal with

prejudice remedy on violations of the 120-day trial limit, Congress made crystal clear its view that trial must be had before the expiration of that time limit. Once that time limit expires, as it did here, any trial constitutes a miscarriage of justice. Accordingly, Petitioner is entitled to "automatic reversal of his conviction" on collateral review, *id.*, even under the miscarriage of justice standard.

The United States compares Congress's mandatory dismissal remedy for IAD speedy trial violations with the judicially-created mandatory remedy for Federal Rule of Criminal Procedure 11 violations set forth in *McCarthy v. United States*, 394 U.S. 459 (1969), and points outs that in *Timmreck* this Court refused to grant the same relief in a section 2255 motion alleging a violation of Rule 11. (Amicus Br. 19-20.) This comparison is inapt for two reasons. First, like the exclusionary rule addressed in *Stone*, the *McCarthy* dismissal requirement is a judicially-created remedy emanating from this Court's supervisory power. *See McCarthy*, 394 U.S. at 464. In contrast, the mandatory dismissal requirement of IAD Article V(c) is a congressionally-enacted remedy -- backed up by the IAD section 5 enforcement directive -- which this Court must enforce. Second, as is noted above at 12, *supra*, *Timmreck* is another example of a section 2255 motion brought in an effort to cure a procedural default on direct review. Because the *Timmreck* movant had failed to appeal, he was forced to confront the "miscarriage of justice" standard, which he could not satisfy. Consequently, *Timmreck* and *McCarthy* do not apply here.

IV. THIS COURT CAN AND SHOULD FINALLY DISMISS THE CHARGES AGAINST PETITIONER.

More than a decade has passed since the Indiana trial court denied Petitioner's motion to dismiss and tried him in violation of the IAD's 120-day time limit. During those 10 years, which he has spent in prison on this charge, Petitioner has pursued every required step of the state and federal procedures to have his claim addressed on the merits. Resolving the merits, which were briefed before the

federal district court and court of appeals, should be a simple matter of reading an unambiguous interstate compact, counting the days from the time Petitioner entered Indiana's custody to the date of his trial, and giving effect to the plain language of the IAD, which expresses the will of Congress and the interstate compact obligations to which Indiana agreed. As demonstrated by the very case Respondents cite, this Court may resolve a question not addressed by the court of appeals. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984).[15] Petitioner's claim should be addressed promptly rather than remanded, which will only cause further delay.

Respondents point out that three courts have rejected Petitioner's IAD claim on the merits (R. Br. 41); they overlook the fact that no two courts have been able to agree on an acceptable rationale. The state trial court confessed ignorance of the 120-day limit after the time had passed (J.A. 113), and its written order denying the motion to dismiss contained no explanation. (J.A. 125.) The Indiana Supreme Court announced a general rule, which Petitioner plainly had satisfied (objection must be made "at the time the date was set or during the remainder of the time limit" (J.A. 157)), but nevertheless rejected Petitioner's claim because he did not object in court on June 27 or August 1 when the trial dates were set (J.A. 157) -- even though the trial court had instructed Petitioner that it preferred written to oral submission. (J.A. 39-40, 123) ("I want it in writing"; "I read better than I listen.").

Given that Article IV(c) expressly imposes an automatic time limit on the states, and that the state prosecutor and trial judge who signed the IAD custody request ignored that time limit and missed

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[15] Likewise, Supreme Court Rule 14.1(a) permits this Court to consider issues subsumed in the question presented, as "[t]he statement of any question presented will be deemed to comprise every subsidiary question fairly included therein." *Id.* As the court of appeals affirmed the denial of petitioner's writ of habeas corpus, the question whether a writ should issue is a subsidiary issue of the instant question presented.

it, the federal district court could not endorse the conclusion that Petitioner, who thrice asked for a timely trial, was the party who defaulted on an obligation of the IAD. Instead, that court turned to Article VI(a) of the IAD and concluded that the pretrial motions Petitioner had filed made him "unable to stand trial" and thus excused Indiana's failure to try him within the 120-day period. (J.A. 195-96.)

Regardless of whether Article VI(a) contemplates that a defendant can become "unable to stand trial" merely by filing pretrial motions,[16] that conclusion was not one the district court could reach. Article VI(a) is a tolling provision which, by its terms, must be invoked by the state court before the trial: "the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, *as determined by the court having jurisdiction of the matter*." Art. VI(a), 18 U.S.C. app. § 2 (emphasis added). The state trial court (and the Indiana Supreme Court) never concluded that Petitioner was "unable to stand trial" for any reason, much less because he had filed pretrial motions. By its express terms, therefore, Article VI(a) precluded the district court from reaching this conclusion as a substitute for the inadequate justifications given by the state courts for their failure to try Petitioner within the time limit of Article IV(c).

No court has reached a satisfactory rationale for permitting the Petitioner's trial to go forward after Indiana just plain missed the 120-day deadline -- because there is no such rationale. After 10 years of incarceration in violation of the IAD, a "law of the United States," this Court should order Indiana to release Petitioner forthwith.

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[16] Furthermore, not one of the Article VI(a) cases that Indiana cites contains any analysis of the issue. In contrast, *Birdwell v. Skeen*, 983 F.2d 1332, 1340-41 (5th Cir. 1993), carefully analyzes Congress's use of the phrase "unable to stand trial" and concludes that that phrase is limited to situations in which a defendant is mentally or physically incapable of proceeding to trial. *See also Stroble v. Anderson*, 587 F.2d 830, 838 (6th Cir. 1978).

CONCLUSION

The "breach of contract" to which Respondents all but confess in their Conclusion was no ordinary breach; it was a violation of an interstate compact and a federal law enacted by Congress in part to ensure the federal speedy trial right that this breach denied Petitioner. This interstate compact specifies a remedy for the breach -- dismissal with prejudice -- and further specifies that "[a]ll courts . . . of the United States . . . are hereby directed to enforce the agreement on detainers . . . ." 18 U.S.C. app. § 5.

After giving the state courts in Indiana a full opportunity to correct their error and to compel the state to perform its obligations under this compact, Petitioner has come to the federal courts seeking enforcement. Nothing Congress has enacted -- either in the Interstate Agreement on Detainers itself or in the Habeas Corpus Act -- and nothing this Court has ever held in addressing either of those two statutes, suggests any conclusion other than to compel Indiana to perform its IAD obligations, to dismiss the charges against Petitioner, and to release him from custody forthwith.

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Dated: March 9, 1994

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No. 93-5418

In the Supreme Court of the United States

OCTOBER TERM, 1993

ORRIN S. REED, PETITIONER

v.

ROBERT FARLEY, SUPERINTENDENT,
INDIANA STATE PRISON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a state prisoner is entitled to habeas corpus relief under 28 U.S.C. 2254 for a violation of Article IV(c) of the Interstate Agreement on Detainers (IAD), which requires a State that has lodged a detainer against a prisoner to try the prisoner on the charges underlying the detainer within 120 days after he is brought into that State.

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INTEREST OF THE UNITED STATES

The Interstate Agreement on Detainers (IAD) provides a means whereby a prisoner being held in one jurisdiction (the sending State) may be transferred to another jurisdiction (the receiving State) for trial on charges pending against him in the latter jurisdiction. Under Article IV(c) of the IAD, when a receiving State lodges a detainer against a prisoner and requests custody of him in order to try him on the charges underlying the detainer, it must bring him to trial within 120 days after he is brought into the receiving State. This case presents the question whether a violation of Article IV(c) is cognizable in a habeas corpus proceeding under 28 U.S.C. 2254.

The United States has a substantial interest in the outcome of this case. The United States is a party to the IAD, see 18 U.S.C. App. § 2, Art. II(a), at 702, and is subject to the 120-day provision in Article IV(c), cf. *United States* v. *Mauro*, 436 U.S. 340, 354 (1978). Moreover, although this case concerns the availability of habeas relief to state prisoners, the Court's analysis of that issue is likely to affect the disposition of claims for collateral relief by federal prisoners under 28 U.S.C. 2255.

STATUTORY PROVISIONS INVOLVED

Article IV of the Interstate Agreement on Detainers provides, in pertinent part (see 18 U.S.C. App. § 2, at 703):

> (c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Article V of the Interstate Agreement on Detainers provides, in pertinent part (see 18 U.S.C. App. § 2, at 703-704):

> (c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

Section 2254 of Title 28 provides, in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT

1. In December 1982, petitioner was charged by an information filed in Fulton County, Indiana, with theft and with being an habitual criminal. J.A. 1, 175. Based on those charges, Indiana officials lodged a detainer with the Federal Penitentiary in Terre Haute, Indiana, where petitioner was then incarcerated on unrelated charges. J.A. 156, 175.[1] Indiana officials also asked that petitioner be transferred to state custody pursuant to Article IV of the Interstate Agreement on Detainers (IAD) for trial on the charges underlying the detainer. J.A. 4-6.[2] Petitioner was transferred from federal to state custody on April 27, 1983. J.A. 156. Under Article IV(c) of the IAD, his trial was required to begin within 120

[1] A detainer is "a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking that the prisoner be held for the agency, or that the agency be advised when the prisoner's release is imminent." *Fex* v. *Michigan*, 113 S. Ct. 1085, 1087 (1993).

[2] Under the IAD, either the prisoner or the prosecuting officials may initiate the process for disposing of the charges underlying a detainer. If the prisoner initiates the process by requesting a disposition of the charges, he must, under Article III(a), be brought to trial within 180 days after his request has been received by the prosecuting officials. *Fex*, 113 S. Ct. at 1088-1091. If the prosecuting officials initiate the process, the prisoner must, under Article IV(c), be brought to trial "within one hundred and twenty days of the arrival of the prisoner in the receiving State." (When the United States is the "sending State," the 120-day period begins when the prisoner is transferred from federal to state custody.) The 180-day period in Article III(a) and the 120-day period in Article IV(c) are known as the "speedy trial" provisions of the IAD.

days after the transfer—*i.e.*, on or before August 25, 1983—in the absence of a continuance or a tolling event.[3]

Before the 120-day period prescribed in Article IV(c) expired, petitioner appeared at two pretrial conferences at which the trial date was discussed. At the first conference, on June 27, 1983, the court set a trial date of September 13, 1983, which was beyond the 120-day period, but petitioner did not object. At the second conference, on August 1, 1983, the court reset the trial date to September 19, 1983; petitioner again failed to object. J.A. 156-157.

On August 29, 1983, four days after the 120-day period expired, petitioner filed an "Affidavit of Emergency" and "Petition for Discharge," alleging that the State's failure to bring him to trial within the 120-day period violated Article IV(c). J.A. 157; see also J.A. 94-96. The court denied the petition as untimely. J.A. 113-114; see also Br. in Opp. 2-3.

Petitioner's trial began on October 18, 1983. He was convicted and sentenced to 34 years' imprisonment as an habitual offender. J.A. 2.

The Indiana Supreme Court affirmed the conviction. J.A. 152-168. It rejected petitioner's Article IV(c) claim, stating: "A defendant applying for discharge pursuant to the [IAD] may be precluded from relief if he fails to object to a date beyond the requisite period at the time the date was set or

[3] Article IV(c) states that "trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." Article VI(a) of the IAD provides for tolling of the 120-day period prescribed in Article IV(c):

> In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

during the remainder of the time limit." J.A. 157. Petitioner was subsequently denied post-conviction relief in the state courts. J.A. 169-187.

2. Petitioner then filed a petition for relief under 28 U.S.C. 2254 in the United States District Court for the Northern District of Indiana. The district court denied the petition. J.A. 188-198. It rejected petitioner's Article IV(c) claim, holding that "a significant amount of the delay of trial is attributable to the many motions filed either by the petitioner or filed on the petitioner's behalf," and that the delay caused by petitioner's motions was excludable in determining whether petitioner had been brought to trial within the 120-day period prescribed in Article IV(c). J.A. 195-196.

3. The court of appeals affirmed. J.A. 199-211. It began by considering what standard to apply in analyzing petitioner's claim. It observed that this Court "has yet to decide" (J.A. 202) under what circumstances a federal court may grant habeas corpus relief based on a prisoner's claim that he is in custody under a state criminal conviction "in violation of the * * * laws * * * of the United States" within the meaning of 28 U.S.C. 2254(a). The court of appeals noted that this Court has addressed that issue under 28 U.S.C. 2255, "which applies to federal prisoners, but the language of [which] * * * is identical in all material respects" to Section 2254(a). J.A. 203. In particular, the court of appeals stated, the Court's decisions in *Davis* v. *United States*, 417 U.S. 333 (1974), and *Hill* v. *United States*, 368 U.S. 424 (1962), "call on us to search for 'exceptional circumstances' amounting to 'a fundamental defect which inherently results in a complete miscarriage of justice'" to determine whether relief is available under Section 2255 for a claim based on a "law[ ]," as distinguished from the Constitution, of the United States. J.A. 203. But the court of appeals thought that "such formu-

las rarely settle concrete disputes" and that "[v]erbal analysis" of the standard articulated in *Davis* and *Hill* "is unlikely to get us anywhere." J.A. 203, 204. The court ultimately determined that *Stone* v. *Powell*, 428 U.S. 465 (1976), "establishes the proper framework for evaluating claims under the IAD." J.A. 209. In *Stone*, this Court held that, in ruling on a petition by a state prisoner under Section 2254, a federal court should not consider a claim that evidence from an unconstitutional search and seizure was introduced at the prisoner's trial if the prisoner had "an opportunity for full and fair litigation of [the] claim in the state courts." 428 U.S. at 469.

Under the *Stone* framework, the court of appeals stated, "[u]nless a state fails to entertain and resolve claims under the IAD, collateral review is unavailable in federal court." J.A. 209. Applying that principle here, the court of appeals held that petitioner's claim of a violation of the "speedy trial" provision in Article IV(c) of the IAD was not cognizable under Section 2254, because the Indiana courts adequately "entertained and resolved [his] contention that the trial began too late." J.A. 209.

4. The court of appeals denied petitioner's petition for rehearing and suggestion of rehearing en banc. J.A. 212-214. Judge Cudahy and Judge Ripple dissented from the denial of rehearing en banc. In a written statement explaining his dissent, Judge Ripple observed that the panel's opinion "sets us on a different course from that adopted by the other circuits." J.A. 212.

SUMMARY OF ARGUMENT

A. The question whether petitioner's claim is cognizable on collateral review is governed by the standard that this Court articulated in *Hill* v. *United States*, 368 U.S. 424 (1962). There, and in other similar cases, this Court has held

that when a prisoner brings a collateral challenge to his criminal conviction in federal court based on a "law of the United States," rather than a claim that is jurisdictional or constitutional in nature, collateral relief is available only if the claimed error involves "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." 368 U.S. at 428.

The *Hill* standard is applicable here. Contrary to petitioner's assertion, that standard is not limited to claims brought by federal prisoners under 28 U.S.C. 2255; it applies equally to non-constitutional claims brought by state prisoners under 28 U.S.C. 2254. And the standards for non-constitutional claims govern petitioner's claim under Article IV(c) of the IAD, notwithstanding his assertion that his claim is "of constitutional dimension."

We do not agree with the court of appeals that the *Hill* standard must be jettisoned on the ground that it is too vague to be useful. The vast majority of the lower federal courts have agreed on the manner in which the *Hill* standard applies to IAD claims, holding that such claims are not cognizable on collateral review in the absence of a showing of actual prejudice.

B. The lower courts are correct in requiring proof of actual prejudice. This Court has made clear that it is not sufficient for a prisoner bringing a collateral attack on his conviction to prove that an error occurred of the sort that would have led to reversal of the conviction on direct review. Rather, the prisoner must show that the error caused actual prejudice to his right to a fair trial.

In arguing that proof of actual prejudice is not required in this case, petitioner relies primarily on Article V(c) of the IAD, which states that if a prisoner is not brought to trial within the 120-day period prescribed in Article IV(c), the

court with jurisdiction over the charges shall dismiss them with prejudice. Article V(c), however, addresses the relief to be granted in a criminal proceeding initiated under the IAD. It does not address the quite separate question of the scope of the remedy for an IAD violation when the violation is raised on collateral attack. That question is governed instead by this Court's habeas corpus jurisprudence, which makes clear that collateral relief, at least for non-constitutional claims, is not available in the absence of proof of actual prejudice.

C. Petitioner does not allege actual prejudice, and there is no indication that he suffered any such prejudice as a result of the alleged IAD violation in this case. Petitioner can show prejudice only if he can show that the alleged error created a significant risk of an unreliable disposition of the charges against him. Because the alleged violation in this case did not increase the risk of an unreliable result in petitioner's case, he was properly denied relief under Section 2254.

ARGUMENT

PETITIONER'S CLAIM OF A VIOLATION OF ARTICLE IV(C) OF THE INTERSTATE AGREEMENT ON DETAINERS IS NOT COGNIZABLE ON COLLATERAL REVIEW

A. The Question Whether Collateral Relief Is Available For A Violation Of Article IV(c) Of The IAD Is Governed By The *Hill* Standard

In *Hill* v. *United States*, 368 U.S. 424 (1962), the district court violated Rule 32(a) of the Federal Rules of Criminal Procedure by failing to invite the defendant to address the court personally at sentencing. Based on that error, the defendant sought to vacate his sentence under 28 U.S.C. 2255. This Court denied relief, holding that the district court's failure to follow the formal requirements of Rule 32(a) was not an error that could be raised on collateral attack. 368 U.S. at 426.

The Court found that the error in *Hill* did not present one of the "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." 368 U.S. at 428. That is, collateral relief was not available, because the error was not constitutional or jurisdictional in nature, and it did not constitute "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." *Ibid.*[4]

The court of appeals in this case determined that petitioner's claim presented a "statutory question" arising under the IAD, not a constitutional question. J.A. 202. It noted that this Court has applied the "fundamental defect" standard from *Hill* in cases involving collateral challenges based on non-constitutional claims, but it declined to apply that standard here, concluding that it provides inadequate guidance on the question whether violations of Article IV(c) of the IAD are cognizable on collateral review. J.A. 203-204.

Unlike the court of appeals, we believe the *Hill* standard is sufficiently clear to provide useful guidance in reviewing non-constitutional claims on collateral attack. We therefore do not join the court of appeals in urging its abandonment in favor of a different formulation.

1. This Court has consistently applied the standard articulated in *Hill* to cases involving collateral attacks based on non-constitutional claims. In *Davis* v. *United States*, 417 U.S. 333 (1974), a convicted defendant sought relief from

[4] The reference in *Hill* to omissions "inconsistent with the rudimentary demands of fair procedure" appears to be simply another articulation of the "fundamental defect" standard, as applied to omissions rather than affirmative errors. The Court has described the *Hill* test for non-constitutional errors by reference only to the "fundamental defect" language, see *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979); *Brecht* v. *Abrahamson*, 113 S. Ct. 1710, 1720 n.8 (1993), and we follow that course here.

his conviction under Section 2255 based on the claim that the conduct of which he was convicted did not constitute a crime. The Court confirmed that collateral relief from criminal convictions can be granted based on non-constitutional claims, but only when those claims satisfy the standard adopted in *Hill*. Undertaking that inquiry, the Court reasoned that if Davis's claim was well founded, "then [his] conviction and punishment are for an act that the law does not make criminal." 417 U.S. at 346. The Court found "no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under § 2255." *Id.* at 346-347 (quoting *Hill*, 368 U.S. at 428). The Court accordingly held that Davis's claim "is cognizable in a § 2255 proceeding." *Id.* at 347.

On two occasions since *Davis*, the Court has applied the "fundamental defect" standard to determine whether collateral relief was available for a non-constitutional claim. In *United States* v. *Timmreck*, 441 U.S. 780 (1979), the Court held that collateral relief was not available for a prisoner's claim that the sentencing court violated Rule 11 of the Federal Rules of Criminal Procedure by failing to advise him before he entered a guilty plea that he would receive a mandatory special parole term of at least three years. 441 U.S. at 783-785. In so holding, the Court determined that the alleged violation of Rule 11 did not result in a "complete miscarriage of justice" or otherwise present exceptional circumstances warranting collateral relief. *Id.* at 783-784.

In *United States* v. *Addonizio*, 442 U.S. 178 (1979), the Court held that collateral relief was not available to review the claim by three federal prisoners that a postsentencing change in the policies of the United States Parole Commission prolonged their actual imprisonment beyond the period intended by the sentencing judge. 442 U.S. at 179. The Court stated that "unless the claim alleges a lack of jurisdiction or

constitutional error * * * an error of law does not provide a basis for collateral attack unless the claimed error constitute[s] 'a fundamental defect which inherently results in a complete miscarriage of justice.' " *Id.* at 185 (quoting *Hill*, 368 U.S. at 428). The Court concluded that the claim before it was not cognizable because, even accepting the claim as true, "the [sentencing] proceeding was not infected with any error of fact or law of the 'fundamental' character that renders the entire proceeding irregular and invalid." *Id.* at 186.

2. a. Petitioner contends that the "fundamental defect" standard enunciated in *Hill* and applied in *Davis*, *Timmreck*, and *Addonizio* should not be applied here. He first argues (Br. 31-36) that the *Hill* standard applies only to claims by federal prisoners under 28 U.S.C. 2255, and not to claims by state prisoners under 28 U.S.C. 2254.[5] As the court of appeals observed, however, *Hill* and the cases following it "were decided under 28 U.S.C. § 2255, which applies to federal prisoners, but the language of § 2254 and § 2255 is identical in all material respects, and the Court has concluded that the two are 'identical in scope'." J.A. 203 (quoting *Davis*, 417 U.S. at 343).

As the court of appeals indicated, the Court's decision in *Davis* rested heavily on its view that the scope of relief

[5] The fact that *Hill*, *Davis*, *Timmreck*, and *Addonizio* involved collateral challenges to federal convictions under Section 2255 does not indicate that the "fundamental defect" standard is inapplicable to challenges to state convictions under Section 2254; it indicates, instead, as petitioner acknowledges (Br. 34-35), that "few 'laws . . . of the United States' have any impact upon state criminal proceedings." See also *Developments in the Law: Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1070-1071 (1970). The IAD is a congressionally sanctioned interstate compact, and as such has been held to be a law of the United States. See *Carchman* v. *Nash*, 473 U.S. 716, 719 (1985); *Cuyler* v. *Adams*, 449 U.S. 433, 438 (1981); see also *Casper* v. *Ryan*, 822 F.2d 1283, 1288 (3d Cir. 1987), cert. denied, 484 U.S. 1012 (1988); *Bush* v. *Muncy*, 659 F.2d 402, 406-407 (4th Cir. 1981), cert. denied, 455 U.S. 910 (1982); *Echevarria* v. *Bell*, 579 F.2d 1022, 1024-1025 (7th Cir. 1978).

available under Section 2255 is coextensive with that available under Section 2254. In rejecting the government's argument that relief was not available under Section 2255 for non-constitutional violations, the Court in *Davis* relied primarily on "the clear and simple language" of Sections 2254 and 2255 and the "unambiguous legislative history" of the latter provision, both of which "show[ ] that § 2255 was intended to mirror § 2254 in operative effect." 417 U.S. at 344. Because the Court understood Section 2254 to encompass non-constitutional claims brought by state prisoners, the Court concluded that Section 2255 must also be construed to encompass non-constitutional claims brought by federal prisoners.[6]

b. Petitioner next argues (Br. 27) that the *Hill* standard is inapplicable because the violation of Article IV(c) of the IAD that he alleges is "of constitutional dimension." The claim is "of constitutional dimension," he argues (Br. 26), because Article IV(c) "effectuates" the constitutional right to a speedy trial.

That argument is unavailing. In *Timmreck*, this Court applied the *Hill* standard in reviewing a claim alleging a violation of Fed. R. Crim. P. 11. In a prior decision involving direct review of a claim based on Rule 11, however, the Court described Rule 11 as "designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary." *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969). Thus, *Timmreck* makes clear that the *Hill* standard applies on collateral re-

[6] In other contexts, the Court has likewise indicated that the scope of collateral relief available to federal prisoners under Section 2255 is coextensive with that available to state prisoners under Section 2254. See, *e.g.*, *Francis* v. *Henderson*, 425 U.S. 536, 539-540 (1976) (extending to claims under Section 2254 the "cause and prejudice" rule enunciated in *Davis* v. *United States*, 411 U.S. 233 (1973), for claims under Section 2255).

view of a non-constitutional claim, even if the claim is based on a provision that safeguards constitutional rights.

3. Although the Seventh Circuit recognized that in reviewing collateral challenges based on non-constitutional claims, "*Davis* and *Hill* call on [courts] to search for exceptional circumstances amounting to a fundamental defect which inherently results in a complete miscarriage of justice," J.A. 203 (internal quotation marks omitted), it declined to undertake that search in this case, based on its view that "such formulas rarely settle concrete disputes." *Ibid.* In our view, however, the *Hill* standard is a workable one that provides sufficient guidance to resolve collateral attacks based on non-constitutional claims, including collateral challenges based on asserted violations of the "speedy trial" provisions of the IAD.

The great majority of the lower courts have applied the *Hill* standard to hold that violations of the speedy trial provisions of the IAD are not cognizable on collateral review, at least in the absence of proof of actual prejudice. That holding has been adopted in eight circuits: the Seventh Circuit in this case, and the First, Second, Third, Fourth, Fifth, Sixth, and Eleventh Circuits in previous cases.[7] It appears that only the

[7] See *Fasano* v. *Hall*, 615 F.2d 555, 557-559 (1st Cir.) (denying relief under Section 2254 for violations of speedy trial provisions), cert. denied, 449 U.S. 867 (1980); *Reilly* v. *Warden*, 947 F.2d 43, 44 (2d Cir. 1991) (per curiam) (same), cert. denied, 112 S. Ct. 1227 (1992); *Cooney* v. *Fulcomer*, 886 F.2d 41, 45-46 (3d Cir. 1989) (same); *Casper* v. *Ryan*, 822 F.2d at 1288-1291 (same); *Kerr* v. *Finkbeiner*, 757 F.2d 604, 607 (4th Cir.) (violation of IAD's speedy trial provision not cognizable under Section 2254, "[a]s Kerr has introduced no evidence indicating that he has suffered any prejudice in his incarceration or in defending against the charges against him"), cert. denied, 474 U.S. 929 (1985); *Birdwell* v. *Skeen*, 983 F.2d 1332, 1334-1336 & n.11 (5th Cir. 1993) (granting relief under Section 2254 for violation of IAD's speedy trial provision where petitioner established actual prejudice); *Browning* v. *Foltz*, 837 F.2d 276,

Ninth Circuit has adopted the contrary position, holding that violations of the IAD's speedy trial provisions are cognizable on collateral review even in the absence of proof of actual prejudice. See *Johnson* v. *Stagner*, 781 F.2d 758, 761 (1986); *Tinghitella* v. *California*, 718 F.2d 308, 310-312 (1983) (per curiam); *Cody* v. *Morris*, 623 F.2d 101, 102-103 (1980).

To be sure, there is some disagreement among the lower courts with respect to the cognizability of different types of IAD violations. Specifically, the Third and Ninth Circuits distinguish between claims based on the IAD's "speedy trial" provisions and claims based on the IAD's "antishuttling" provisions.[8] The Third Circuit holds that claims based on the IAD's speedy trial provisions are not cognizable in the absence of proof of actual prejudice, *Cooney* v. *Fulcomer*, 886 F.2d 41, 45-46 (1989); *Casper* v. *Ryan*, 822 F.2d 1283, 1288-1291 (1987), cert. denied, 484 U.S. 1012 (1988), whereas claims based on the IAD's antishuttling provisions are generally cognizable, *United States* v. *Williams*, 615 F.2d 585, 589-591 (1980); see also *United States ex rel. Esola* v. *Groomes*, 520 F.2d 830, 836-839 (1975). The Ninth Circuit,

283 (6th Cir. 1988) (violations of speedy trial provisions of IAD not cognizable on collateral review), cert. denied, 488 U.S. 1018 (1989); *Stroble* v. *Egeler*, 547 F.2d 339, 340-341 (6th Cir. 1977) (per curiam) (district court order denying relief under Section 2254 for alleged violation of speedy trial provision is remanded for determination of whether violation caused prejudice and, if not, whether relief warranted in absence of prejudice); *Seymore* v. *Alabama*, 846 F.2d 1355, 1356-1357, 1359-1360 (11th Cir. 1988) (violation of speedy trial provision "will support no post-conviction relief pursuant to 28 U.S.C. Sec. 2254 when petitioner alleges no facts casting substantial doubt on the state trial's reliability on the question of guilt"), cert. denied, 488 U.S. 1018 (1989).

[8] Under the "antishuttling" provisions, once a prisoner is sent to a receiving State, the charges against the prisoner must be finally disposed of before the prisoner is returned to the sending State. See 18 U.S.C. App. § 2, Arts. III(d) and IV(e), at 703.

in contrast, holds that claims based on the IAD's speedy trial provisions are generally cognizable even in the absence of proof of actual prejudice, *Johnson* v. *Stagner*, *supra*; *Tinghitella* v. *California*, *supra*; *Cody* v. *Morris*, *supra*, whereas claims based on the IAD's antishuttling provisions are not, *Carlson* v. *Hong*, 707 F.2d 367, 368 (1983) (per curiam); *Hitchcock* v. *United States*, 580 F.2d 964, 966 (1978).[9]

[9] The Second, Fourth, Sixth, Eighth, and Tenth Circuits have, in addition, held that violations of the IAD's "antishuttling" provisions are not cognizable, at least in the absence of proof of actual prejudice. See *Edwards* v. *United States*, 564 F.2d 652, 653-654 (2d Cir. 1977) (per curiam) (violation of antishuttling provision not cognizable under Section 2255); *Bush* v. *Muncy*, 659 F.2d at 409 (Fourth Circuit holds that antishuttling violation not cognizable under Section 2254 because that provision protects only "statutory rights of a fundamental nature closely related to constitutionally secured rights to fair prosecution and adjudication"); *Metheny* v. *Hamby*, 835 F.2d 672, 675 (6th Cir. 1987) (joining the "clear majority" of courts in "holding that, in the absence of exceptional circumstances, a claimed violation of [the antishuttling provision of] the IAD is not a fundamental defect which is cognizable under 28 U.S.C. § 2254"), cert. denied, 488 U.S. 913 (1988); *Mars* v. *United States*, 615 F.2d 704, 707 (6th Cir.) (relief under Section 2255 not available for violation of IAD's antishuttling provision in absence of proof that violation "impugned the integrity of the fact finding process at [petitioner's] trial" or caused harm "in his defense to the pending federal charge or to his status in the state prison system"), cert. denied, 449 U.S. 849 (1980); *Shigemura* v. *United States*, 726 F.2d 380, 381 (8th Cir. 1984) (per curiam) (violation of antishuttling provision not cognizable under Section 2255 in the absence of proof that the violation "prejudiced [the prisoner] in some aspect of his state imprisonment or in defending against a federal charge"); *Huff* v. *United States*, 599 F.2d 860, 862-863 (8th Cir.) (relief under Section 2255 not available for violation of antishuttling provision without proof of prejudice), cert. denied, 444 U.S. 952 (1979); *Greathouse* v. *United States*, 655 F.2d 1032, 1034 (10th Cir. 1981) (per curiam) ("[a]bsent special circumstances, violations of the IAD[ ] are not grounds for collateral attack on a federal conviction and sentence under § 2255"), cert. denied, 455 U.S. 926 (1982).

Despite the Third and Ninth Circuits' differing treatment of different types of IAD violations, the lower courts' application of the *Hill* standard has resulted in a broad consensus with respect to the question presented here. The great majority of the courts have held that a violation of one of the speedy trial provisions of the IAD does not constitute "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure" under the *Hill* standard. As we discuss next, that answer is correct.

B. Under The *Hill* Standard, Collateral Review Of A Claim Based On Article IV(c) Of The IAD Is Not Available In The Absence Of Proof Of Actual Prejudice

It may be difficult to devise a simple formula that would for all purposes serve to identify a "fundamental defect" resulting in a "complete miscarriage of justice." This Court's decisions involving collateral review of non-constitutional claims, however, suggest that, at the least, that standard requires proof that the error in question led to actual prejudice to the defendant.

Although the Court has not used the term "actual prejudice" in the *Hill* line of cases, the Court's analysis of the claims in those cases points to actual prejudice as a prerequisite for relief in each case. The petitioner in *Davis* claimed that he was "convict[ed] and punish[ed] * * * for an act that the law does not make criminal," a clear instance of an error that resulted in actual prejudice to the defendant, since the conviction and sentence were no longer lawful. 417 U.S. at 346. The Court had little difficulty in concluding that such a claim, if valid, involves a "complete miscarriage of justice" and accordingly held that the claim was cognizable. *Id.* at 346-347.

The Court reached the opposite conclusion in *Hill* and *Timmreck* based in large part on the absence of proof of

actual prejudice. In *Hill*, the Court emphasized that the district judge's "failure explicitly to afford a defendant an opportunity to make a statement at the time of sentencing," 368 U.S. at 426, as required by Fed. R. Crim. P. 32(a), was not shown to have affected the proceeding (368 U.S. at 429):

> It is to be noted that we are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed. Nor is it suggested that in imposing the sentence the District Judge was either misinformed or uninformed as to any relevant circumstances. Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak. Whether § 2255 relief would be available if a violation of Rule 32(a) occurred in the context of other aggravating circumstances is a question we therefore do not consider.

The Court in *Timmreck* similarly noted that, notwithstanding the trial judge's failure to advise him of a special parole term when he entered a guilty plea, as required by Fed. R. Crim. P. 11, "[r]espondent does not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty." 441 U.S. at 784. Thus, as in *Hill*, the Court in *Timmreck* found it "unnecessary to consider whether § 2255 relief would be available if a violation of [the Rule] occurred in the context of other aggravating circumstances." 441 U.S. at 784-785.

Similarly, in *Addonizio* the Court found no "fundamental defect" in a change in the Parole Commission's treatment of particular classes of prisoners, which was alleged to have upset the expectations of the sentencing court. Finding that a "judge has no enforceable expectations with respect to the

actual release of a sentenced defendant short of his statutory term," 442 U.S. at 190, the Court concluded that the Parole Commission's actions did not affect the validity of the sentencing proceeding. Put another way, the Parole Commission's action did not give rise to prejudice with respect to any right that the defendants enjoyed as to sentencing.

In arguing that proof of actual prejudice is not required for collateral relief in this case, petitioner relies primarily on Article V(c) of the IAD. See Pet. Br. 36-38. That Article states that in the event of a violation of the 120-day or 180-day speedy trial provisions of the IAD, the court before which the charges are pending "shall enter an order dismissing the same with prejudice." See 18 U.S.C. App. § 2, at 704.

Although Article V(c) provides a remedy of automatic dismissal in the event of a violation of the speedy trial provisions, it does not address the quite separate question whether relief for violations of the speedy trial provisions is available on collateral attack. Nor does any other provision of the IAD address the availability of collateral relief for violations of the speedy trial provisions.[10] That matter is accordingly governed by the principles for collateral relief developed by this Court under Sections 2254 and 2255, one of which is that collateral relief is not available for non-constitutional claims absent proof of actual prejudice.

Petitioner also argues (Br. 37) that the mandatory dismissal sanction prescribed in Article V(c) reflects both Congress's judgment that all violations of the speedy trial

[10] Petitioner's reliance (Br. 24, 30) on Section 5 of the federal Act that codifies the IAD (IAD Act), 18 U.S.C. App. § 5, at 705, is misplaced. That provision merely directs the federal courts and those of the District of Columbia to "enforce" the IAD. It does not address the question of how the speedy trial provisions of the IAD are to be enforced on collateral review. Thus, it has no bearing on the question presented here.

provisions should be treated as "fundamental defects," and Congress's awareness of the difficulties of proving actual prejudice resulting from such violations. This Court's decisions in *McCarthy* and *Timmreck* demonstrate the flaw in that argument.

In *McCarthy*, this Court exercised its supervisory power to adopt a drastic and mandatory remedy for violations of Rule 11 of the Federal Rules of Criminal Procedure, which requires the court to which a defendant tenders a guilty plea to provide the defendant with certain information and to ask him personally to answer certain questions before accepting his plea. 394 U.S. at 464. The Court held that "a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11." *Id.* at 463-464. The Court emphasized that its holding applies regardless of whether the violation of Rule 11 has affected the defendant's understanding of the charges or the consequent voluntariness of his plea. *Id.* at 468-472. In adopting an automatic set-aside remedy, the Court reasoned that "rarely, if ever," can a defendant produce evidence to corroborate his allegation that he did not understand the charges, and that "Rule 11 is designed to eliminate any need to resort to a later fact-finding proceeding in this highly subjective area." *Id.* at 469 (internal quotation marks omitted). The Court accordingly concluded that "prejudice inheres in a failure to comply with Rule 11" and justifies the automatic set-aside remedy for every instance of noncompliance. *Id.* at 471.

In *Timmreck*, the Court was again confronted with a claimed violation of Rule 11, but this time the claim was asserted on collateral review. The Court did not hold that the automatic set-aside remedy was available on collateral review of such claims. On the contrary, it held that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule." 441 U.S. at 785 (quot-

ing *Hill*, 368 U.S. at 429). The Court thus was not willing to conclude, as it had been on direct review in *McCarthy*, that "prejudice inheres in a failure to comply with Rule 11." 394 U.S. at 471.

Timmreck makes clear that the mandatory dismissal remedy prescribed in Article V(c) of the IAD does not justify dispensing with proof of actual prejudice on collateral attack. That remedy may reflect Congress's wish in criminal proceedings initiated under the IAD generally to avoid fact-finding proceedings into the prejudicial impact, if any, of violations of the IAD's speedy trial provisions.[11] The automatic set-aside remedy for Rule 11 violations adopted in *McCarthy* likewise implemented Congress's intent in federal criminal proceedings to avoid factfinding regarding whether a defendant's guilty plea was knowing and voluntary. The Court in *Timmreck*, however, made clear that the existence of such remedies in criminal proceedings does not control the availability of relief in collateral proceedings.

[11] It is significant that the mandatory dismissal remedy prescribed in Article V(c) does not automatically require that the dismissal be with prejudice when the United States is the "receiving State"—*i.e.*, when a prisoner has been transferred from state to federal custody pursuant to the IAD for trial on federal charges—and a violation of the IAD's speedy trial provisions occurs. In that situation, Section 9(1) of the IAD Act directs the court in which the charges are pending, when determining whether to dismiss the charges with prejudice or without prejudice, to consider, among other factors, "the facts and circumstances of the case which led to the dismissal." See 18 U.S.C. App. § 9(1), at 705. Section 9(1) thus reflects Congress's judgment that violations of the IAD's speedy trial provisions are not inherently so serious as to warrant automatic dismissal of federal charges with prejudice in criminal proceedings under the IAD. It therefore undermines petitioner's position that relief for such a violation should automatically be granted in a collateral proceeding.

C. Petitioner Does Not, And Cannot, Show That He Suffered Actual Prejudice As A Result Of The Asserted Violation Of Article IV(c) Of The IAD

Nowhere in his petition or his brief does petitioner contend that he suffered actual prejudice as a result of Indiana's failure to bring him to trial within the 120-day period prescribed in Article IV(c) of the IAD. Although petitioner did make such a contention in his reply brief at the petition stage (at 5-6), that contention was based solely on his assertion that "[a]bsent the Indiana detainer, petitioner would have been in a federal community center while he was awaiting trial," where he "would have had greater access to law materials and potential witnesses." Pet. Rep. Br. 5. Those supposed restrictions, however, were attributable to the detainer that was filed against him, which caused him to be transferred from federal to state custody; the restrictions did not result from any delay in bringing him to trial. Thus, petitioner does not point to any actual prejudice that he suffered because of the State's asserted violation of Article IV(c) of the IAD.

The kind of prejudice necessary to grant relief for a violation of a "law of the United States" raised on collateral attack is prejudice that significantly undermines the reliability of the adjudication. In order for an error to constitute "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure," it must, at the least, be sufficiently grave to cause a significant increase in the risk of an inaccurate verdict at trial.

That is the sense in which the terms "actual prejudice" and "miscarriage of justice" have been used in other settings in habeas corpus law. See *McCleskey* v. *Zant*, 499 U.S. 467, 502 (1991) (no "miscarriage of justice" where error, if any, "resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination"); see also *Sawyer* v. *Whitley*, 112 S. Ct. 2514,

2519 (1992); *Reed* v. *Ross*, 468 U.S. 1, 12 (1984). And that is also the sense in which the concept of prejudice has been used in collateral attacks based on violations of the IAD. See *Seymore* v. *Alabama*, 846 F.2d 1355, 1357 (11th Cir. 1988) (speedy trial violations not cognizable absent proof of "facts casting substantial doubt on the state trial's reliability on the question of guilt"), cert. denied, 488 U.S. 1018 (1989); see also *Bush* v. *Muncy*, 659 F.2d 402, 409 (4th Cir. 1981), cert. denied, 455 U.S. 910 (1982); *Fasano* v. *Hall*, 615 F.2d 555, 558 (1st Cir.), cert. denied, 449 U.S. 867 (1980).

A violation of the speedy trial provisions of the IAD is unlikely ever to result in actual prejudice to the defendant's right to a fair trial. The speedy trial provisions have relatively short time limits—120 days and 180 days. See note 2, *supra*. Violations of those time limits that do not also violate the Sixth Amendment's Speedy Trial Clause are not likely to be prejudicial, because delays of that length are unlikely to result in a significant impairment of the defendant's ability to defend himself at trial. Only that kind of prejudice implicates the "fundamental fairness" of the process for adjudicating criminal liability, which is "the central concern of the writ of habeas corpus." *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986).

As discussed above, petitioner does not allege that Indiana's delay in bringing him to trial impaired his ability to prepare a defense. No showing of such harm could be made on this record. Petitioner was brought to trial approximately seven weeks after he claims that the 120-day period prescribed in Article IV(c) had expired. As the district court found, much of that delay was attributable to litigation of petitioner's numerous pretrial motions. J.A. 195-196. Moreover, four of the seven weeks elapsed pursuant to a continuance to which petitioner consented. See Pet. Br. 7 n.2. Finally, petitioner was released on bond after the first four weeks of the seven-week period. *Ibid.* Under these circumstances, petitioner cannot establish that the alleged violation of Article IV(c) of the

IAD was a "fundamental defect" that resulted in actual prejudice constituting a "complete miscarriage of justice." Petitioner therefore may not collaterally attack his conviction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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